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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 78

THE UNITED STATES OF AMERICA, PETITIONER

vs.

VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER,
JOHN J. HUMPHREY, ALSO KNOWN AS JOHN J.
HUMPHREY, SR., ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1942
CERTIORARI GRANTED JUNE 1, 1942

NO. 9680

United States
Circuit Court of Appeals

For the Ninth Circuit.

**VICTOR N. MILLER, also known as VIC
MILLER, JOHN J. HUMPHREY, also known
as JOHN J. HUMPHREY, SR., also known
as J. M. HUMPHREY, CHARLES J. McCON-
NELL, also known as CHAS. J. McCONNELL,
ELMER JOHNSON and HILMA JOHNSON,
his wife, DAVID WILSON AGNEW, AL-
BERT ROUGE and FLORENCE VAN
SANTEN,**

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United
States for the Northern District of California,
Northern Division.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Complaint.....	2
Answer of Albert Rouge.....	60
Answer of Charles J. McConnell.....	43
Answer of David Wilson Agnew.....	52
Answer of Elmer Johnson and Helma Johnson.....	46
Answer of Florence Van Santen.....	65
Answer of Victor N. Miller and John J. Humphrey.....	39
Appeal:	
Designation of contents of record on (Appellee's) (District Court).....	148
Designation of contents of record on (Appellants') (District Court).....	143
Designation of contents of record on (Appellants') (Circuit Court of Appeals).....	446
Designation of contents of record on (Appellee's) (Circuit Court of Appeals).....	463
Notice of.....	133
Statement of points on (District Court).....	136
Statement of points on (Circuit Court of Appeals).....	446

Index	Page
Application of Charles J. McConnell, Victor N. Miller and John J. Humphrey to obtain portion of money with respect to Parcel #7.....	69
Attorneys of Record, Names and Addresses of	1
Certificate of Clerk to Record on Appeal.....	151
Complaint, Amended.....	2
Declaration of Taking.....	23
Designation of Appellant of Contents of Record on Appeal (District Court).....	143
Designation of Appellee of Portions of Record on Appeal (District Court).....	148
Designation of Contents of Record on Appeal (Appellant's) (Circuit Court of Appeals).....	446
Designation of Contents of Record on Appeal (Appellee's) (Circuit Court of Appeals).....	463
Instructions, additional, requested by Plaintiff and Defendants	94
Instructions requested by Plaintiff and Defendants	75
Judgment after Verdict.....	112
Judgment on Declaration of Taking.....	34
Motion of Charles J. McConnell et al for new trial	131
Motion of Charles J. McConnell to modify, amend and/or correct Judgment.....	126
Motion of Victor N. Miller and John J. Humphrey to modify, amend and/or correct Judgment	130

Index

Page

Notice of Appeal 133

Notice of Order granting motions to modify
Judgment in part and denying motions in
other respects 130

Order dispensing with printing of original ex-
hibits 465

Order granting application of Charles J. Mc-
Connell, et al to obtain portion of Money
with respect to Parcel 7 73

Order transferring Exhibits and Reporter's
Transcript to Circuit Court of Appeals 142

Receipt for payment received on Parcel #7 74

Statement of Points on Appeal (Circuit Court
of Appeals) 446

Statement of Points on Appeal (District
Court) 136

Testimony 152

Exhibit for United States:

6—Statement of Albert Rouge to Bu-
reau of Reclamation, Redding Cali-
fornia, dated November 2, 1937.

Charge to the Jury 419

Instructions to the Jury 419

Witnesses for defendants:

Agnew, David Wilson

—direct 327

—cross 345

Index	Page
Witnesses for defendants (cont.):	
Glaha, Bernard G.	
—direct	354
—cross	355
Humphrey, John J., Sr.	
—direct	226
—cross	259
—redirect	265
Johnson, Elmer H.	
—direct	316
—cross	318
—redirect	322
Kronschabel, Leland H.	
—direct	283
—cross	289
Miller, Victor N.	
—direct	270
—cross	280
Mellin, Gilbert F.	
—direct	356
O'Connor, Francis E.	
—direct	295
—recalled, direct	347
—recross	354
Pearl, George L.	
—direct	192
—cross	219
—redirect	225

United States of America

v

Index

Page

Witnesses for defendants (cont.):

Rouge, Albert

—direct 301

—cross 306

—redirect 312

Van Santen, Mrs. Florence

—direct 324

Witnesses for the Government:

Herrmann, F. C.

—direct 398

—cross 413

Mapel, Thomas G.

—direct 358

—cross 384

Mellin, Gilbert F.

—direct 152

—cross 171

Verdict of the Jury 110

Proceedings in U. S. C. C. A.; Ninth Circuit 406

Order of submission 406

Order directing filing of opinions and judgment 406

Opinion, Stephens, J. 406

Opinion, Garrecht, J., concurring in part and dissenting

in part 475

Judgment 477

Clerk's certificate 477

Order allowing certiorari 478

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In the District Court of the United States, in and
for the Northern District of California,
Northern Division

No. 4027L

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND, [1*]

Defendants. [3]

AMENDED COMPLAINT IN EMINENT
DOMAIN

Comes now the United States of America, the plaintiff in the above-entitled action, by Frank J. Hennessy, United States Attorney for the Northern District of California, and R. B. McMillan, Assistant United States Attorney for said District, as attorneys on behalf of said plaintiff, on application of the Secretary of the Interior of the United States of America, and under direction of and by authority of the Attorney General of the United States of America, and files herein, as of course, before any answer or demurrer is filed herein or entered in the docket, its Amended Complaint, and for cause of action against the above-named defendants complains and alleges:

I.

That under and in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. 388), en-

*Page numbering appearing at foot of page of original certified Transcript of Record.

titled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", commonly known as the Reclamation Act, and under and in pursuance of acts amendatory thereof or supplementary thereto, and particularly the Act of Congress approved April 8, 1935 (49 Stat. 115), the Act of Congress approved June 22, 1936 (49 Stat. 1622), and the Act of Congress approved May 9, 1938 (Public No. 497—75th Congress, Chapter 187—3d Session), the Secretary of the Interior of the United States has secured information in detail concerning the water supply, the engineering features, the cost of construction, land prices and the probable cost of development of that certain project known as and designated the Central Valley Project, California, and under date of November 25, 1935, made a finding in writing that the said Central Valley Project, California, is feasible, [4] that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States, and recommended the construction thereof, which said recommendation was approved by the direct order of the President of the United States, under date of December 2, 1935.

II.

That the aforesaid Central Valley Project, California, recommended, authorized and adopted as aforesaid, was re-authorized by Act of Congress, approved August 26, 1937 (50 Stat. 844) wherein it is provided, among other things, as follows:

Sec. 2. That the \$12,000,000 recommended for expenditure for a part of the Central Valley Project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935, (49 Stat. 1028, at 1038) entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes", shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War; Provided, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: Provided further, That the entire Central Valley Project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semi-arid lands and lands of In-

dian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: Provided further, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, [5] and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, water rights, and other property necessary for said purposes: And provided further, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

III.

That an integral part of the Central Valley Project involves the acquisition of a right of way

from Redding, California, to Delta, California, for the relocation of the existing main line of the Central Pacific Railway Company, from Redding to Delta, California, of which a major portion will be inundated by the waters of the Shasta Reservoir of the Central Valley Project.

IV.

That in the opinion of the Secretary of the Interior of the United States ample funds appropriated by the Act of Congress approved May 9, 1938 (Public No. 497—75th Congress, Chapter 187—3d Session), are available for the payment of any award or awards which may be rendered as just compensation in this proceeding for said lands.

V.

That pursuant to the provisions of the foregoing Acts of Congress and pursuant to the provisions of an Act of Congress approved August 1, 1888 (25 Stat. 357), the Secretary of the Interior of the United States has determined and is of the opinion that it is useful, proper, necessary, advantageous and in the interest of the United States to acquire title in fee simple, subject to the exceptions hereinafter set forth, [6] to the land hereinafter described by condemnation under judicial process, and has made application to the Attorney General of the United States to cause such proceedings to be commenced, in pursuance of which application the Attorney General has instructed and di-

rected the United States Attorney for the Northern District of California to institute these proceedings.

VI.

That pursuant to law the Secretary of the Interior of the United States has ascertained and selected for acquisition for the purposes prescribed by the foregoing acts of Congress the following described land situate in Shasta County, State of California: [7]

* * * * *

The aforesaid tract, piece or parcel of land contains seven (7) separate ostensible ownerships which are more particularly detailed and described as follows:

Via.

No. 1:

That certain tract, piece or parcel of land, as shown on the plat of survey marked Exhibit "C" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, in the southeast corner of Section Twenty-five (25) in Township Thirty-three (33), North, Range Five (5) West, of the Mount Diablo [6] Meridian in Shasta County, California, which includes portions of Lots One (1), Two (2) and Three (3) in Block Thirteen (13), a portion of Givan Street, all of Lots One (1) and Ten (10) and portions of Lots Two (2), Three (3), Seven (7), Eight (8) and Nine (9) in Block Eleven (11), portions of County Road, Main Street,

North Boulevard, and of a 15-foot lane, all as shown on a map entitled "Map of Boomtown Unit No. 5, Portion of South $\frac{1}{2}$ of Section 25, T. 33 N., R. 5 W., M. D. B. & M., Shasta County, California," filed in the office of the County Recorder of Shasta County on June 2, 1938, in Volume 5 of Maps at page 29; said tract is more particularly described as follows:

Beginning at a point on the south boundary of said section 25 where the same is crossed by the located center line of Central Pacific Railway Company's main track at Engineer's Station 4446+06.50 and which point bears South $87^{\circ} 15'$ West 284.62 feet from the southeast corner of said Section 25, thence along said south boundary South $87^{\circ} 15'$ West 237.46 feet; thence North $43^{\circ} 43' 30''$ East 499.80 feet; thence North $39^{\circ} 13'$ East 102.15 feet; thence North $35^{\circ} 42'$ East 89.75 feet; thence North $31^{\circ} 28' 20''$ East 103.81 feet to the east boundary of said Section 25; thence along said east boundary South $0^{\circ} 29'$ East 266.45 feet to Engineer's Station 4450+35.99 on said located center line; thence continuing along said east boundary South $0^{\circ} 29'$ East 310.07 feet to the southeast corner of said Section 25, thence along the south boundary of said Section 25 South $87^{\circ} 15'$ West 284.62 feet to the point of beginning, and containing 3.17 acres.

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by

deed dated November 1, 1937, and recorded November 12, 1937, in Volume 2 of Rights of Way, Shasta County Records at page 81, and

Subject to the easement of the Pacific Gas & Electric Company as conveyed by deed dated July 8, 1938, and recorded August 4, 1938, in the office of the County Recorder of Shasta County, Series No. 3021, and

Reserving to the County of Shasta an easement in and to that portion of the existing county road, lying within the above described parcel, which was conveyed to the County of Shasta by that certain deed dated February 4, 1938, and recorded February 4, 1938, in Volume 132 of the Official Records of Shasta County at page 317.

That said tract of land so described embraces one (1) parcel of land and is a part of an entire parcel or tract or piece of property situate in the County of Shasta and State [10] and Northern District, Northern Division of California and described as follows:

All of Section Twenty-five (25) in Township Thirty-three (33) North, Range Five (5) West, of the Mount Diablo Meridian, except the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$), and the West Half of the Northwest Quarter of the Southwest quarter ($W\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$) of said Section Twenty-five (25).

That the location and general route of the right of way sought, the termini thereof and the general

relation of said right of way to the entire tract, of which it is a part, is shown for the above described parcel on a plat marked Exhibit "B", prepared by the Bureau of Reclamation, United States Department of the Interior hereto attached and made a part hereof.

That the defendant Albert Rouge is the apparent and presumptive owner of the above described parcel.

That the defendants Leland R. Kronschnabel and Nell R. Kronschnabel, his wife, by virtue of an agreement of sale dated February 4, 1938, and recorded February 4, 1938, in Volume 128 of the Official Records of Shasta County at page 232, may have or claim to have some right, title or interest in and to the above described parcel, the extent and nature of which is to this plaintiff unknown.

That the defendant Florence Van Santen by virtue of a contract to purchase as disclosed by a notice of nonliability dated May 3, 1938, and recorded May 6, 1938, in Volume 129 of the Official Records of Shasta County at page 357, may have or claim to have some right, title or interest in and to that portion of the above described parcel lying within Lot 2 of Block 11 of Boomtown Subdivision Unit No. 5, the extent and nature of which is to this plaintiff unknown.

That the defendants to this Action, the purchasers of lots in Boomtown Unit No. 5 and the public, may have or claim to have some right, title or interest in and to those portions [11] of Givan Street,

the County Road (also known as Grand Coulee Boulevard), Main Street, North Boulevard and a 15-foot lane lying within the above described parcel.

That the defendant The County of Shasta, State of California, a political subdivision of the State of California, may have or claim some interest in the foregoing parcel for unpaid taxes and assessments due against said parcel. [12]

* * * * *

VId.

No. 4:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit "F" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, in Lot Three (3) of Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian and more particularly described as follows:

Beginning at the point where the located center line of the Central Pacific Railway Company's main track intersects the western boundary of that tract of land conveyed by Charles J. McConnell, et al., to Elmer Johnson by deed dated January 7, 1938, and recorded in Volume 127 at page 361 of Official Records of Shasta County, said point of beginning being at Engineer's Station 4466+90.08 on said center line and bears South 88° 38' East 833.91 feet, and South 0° 27' East 835.67 feet from the west

quarter corner of said Section 30, thence North $0^{\circ} 27'$ West 235.51 feet to a point on the arc of a circle from which point the center of said circle bears South $49^{\circ} 08' 25''$ East 3014.82 feet; thence along said arc for a distance of 446.75 feet to a point which bears [16] North $45^{\circ} 06' 18''$ East 446.33 feet from the point of beginning on said arc; thence North $49^{\circ} 49' 15''$ East 52.40 feet; thence North $50^{\circ} 59' 15''$ East 103.49 feet; thence North $52^{\circ} 05' 55''$ East 61.69 feet to a point on the western boundary of that tract of land conveyed by Elmer Johnson, et ux., to Leland R. Kronschnabel, et ux., by deed dated January 7, 1938, and recorded in Volume 140 at page 6 of Official Records of Shasta County; thence along said western boundary South $0^{\circ} 27'$ East 189.92 feet to Engineer's Station 4473+86.51 on aforesaid located center line; thence continuing along said western boundary South $0^{\circ} 27'$ East 194.79 feet to a point on the arc of a circle from which point the center of said circle bears South $41^{\circ} 18' 02''$ East 2714.82 feet; thence along said arc for a distance of 742.84 feet to a point on the western boundary of aforesaid tract of land conveyed to Elmer Johnson, which point bears South $40^{\circ} 51' 38''$ West 740.52 feet from the point of beginning on said arc; thence along said western boundary North $0^{\circ} 27'$ West 257.37 feet to the point of beginning and containing 4.81 acres.

That said tract of land so described embraces one (1) parcel of land that is a part of an entire parcel or tract or piece of property situate in Shasta County and State and Northern District, Northern Division of California and described as follows:

The west 488.85 feet of the east 638.85 feet of the west 1472.11 feet of the south 2780.11 feet of Lots Two (2), Three (3) and Four (4) of Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian, lying North of the county road.

That the location and general route of the right of way sought, the termini thereof and the general relation of said right of way to the entire tract, of which it is a part, is shown for the above described parcel on the aforesaid plat marked Exhibit "B".

That the defendants Elmer Johnson and Hilma Johnson, his wife, are the apparent and presumptive owners of the above described parcel.

That the defendant Charles J. McConnell, by virtue of certain conditions and restrictions set out in that certain [17] deed dated January 7, 1938, and recorded in Volume 127 of the Official Records of Shasta County at page 361, may have or claim to have some right, title or interest in and to the above described parcel, the extent and nature of which is to this plaintiff unknown.

That the defendant The County of Shasta, State of California, a political subdivision of the State

of California, may have or claim some interest in the foregoing parcel for unpaid taxes and assessments due against said parcel. [18]

VII.

No. 6:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit "H" prepared by the Bureau of Reclamation, United [19] States Department of the Interior, hereto attached and made a part hereof, in the Southwest Quarter (SW $\frac{1}{4}$) of Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian containing 0.02 acres and being all that part of Lots One (1), Two (2) and Three (3) in Block Two (2) of Boomtown Unit No. 4 as shown on a map entitled "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed May 16, 1938, in the office of the County Recorder of Shasta County in Volume 5 of Maps at page 26, described as follows:

Beginning at the southeasterly corner of aforesaid Lot 1, distant radially North 63° 07' 20" West 145.05 feet from Engineer's Station 4455+67.42 on the located center line of Central Pacific Railway Company's main track, thence along the south boundary of said Lot 1, West 5.82 feet; thence North 26° 24' East

156.28 feet to the northeast corner of aforesaid Lot 3; thence along the easterly boundary of said Lot 3 South 18° 36' East 7.37 feet to the most northerly corner of Lot 4 in aforesaid Block 2, thence along the southeasterly boundary of aforesaid Lots 3, 2 and 1 South 26° 24' West 148.48 feet to the point of beginning.

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by that certain deed dated October 21, 1937, and recorded in Volume 2 of Rights of Way of the Official Records of Shasta County at page 79.

That said tract of land so described embraces one (1) parcel of land and is a part of an entire parcel or tract or piece of property situate in Shasta County and State and Northern District, Northern Division of California and described as follows:

All of Lots One (1), Two (2) and Three (3) in Block Two (2) of Boomtown Unit No. 4, as said lots are shown on a "Map of Boomtown Unit No. 4, portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed in the office of the County Recorder of Shasta County in Volume 5 of Maps at page 26.

That the location and general route of the Right of way sought, the termini thereof and the general relation of said right of way to the entire tract, of which it is a part, is shown for the above described

parcel on the aforesaid plat [20] marked Exhibit "B".

That the defendant David Wilson Agnew is the apparent and presumptive owner of the above described parcel.

That the defendant Charles J. McConnell, by virtue of certain restrictions set out in that Declaration of Restrictions dated January 20, 1938, and recorded in Volume 129 of the Official Records of Shasta County at page 232, may have or claim to have some right, title or interest in and to the above described property, the extent and nature of which is to this plaintiff unknown.

That the defendants Victor N. Miller and John J. Humphrey, by virtue of that certain agreement dated September 16, 1937, and recorded September 12, 1938, in the office of the County Recorder of Shasta County, Series No. 3562, may have or claim to have some right, title or interest in and to the above described property, the extent and nature of which is to this plaintiff unknown.

That the defendant The County of Shasta, State of California, a political subdivision of the State of California, may have or claim some interest in the foregoing parcel for unpaid taxes and assessments due against said parcel.

Vig.

No. 7:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit

"I" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, situate in Lots Three (3) and Four (4) of Section Thirty (30), Township Thirty-three (33) North, Range Four (4) West of the Mount Diablo Meridian, containing 10.61 acres and more particularly described as follows:

Beginning at a point in the southern boundary of the lands of McConnell and the northern boundary of lands now or formerly belonging to Kenneth Deakins where said common boundary is intersected by the located center line of the Central Pacific Railway Company's main track at Engineer's Station 4450+94.92 distant North $0^{\circ} 29' 15''$ West 371.45 [21] feet, and South $67^{\circ} 55'$ East 37.76 feet from the southwest corner of said Section 30, and running thence along said common boundary North $67^{\circ} 55'$ West 37.76 feet to the west boundary of said Section 30; thence along said west boundary North $0^{\circ} 29' 15''$ West 205.07 feet; thence North $30^{\circ} 31' 30''$ East 234.45 feet; thence North $26^{\circ} 24'$ East 55.82 feet; thence continuing North $26^{\circ} 24'$ East 156.28 feet; thence North $26^{\circ} 09'$ East 389.85 feet; thence North $27^{\circ} 41' 15''$ East 121.47 feet; thence North $28^{\circ} 40' 40''$ East 52.40 feet to a point on the arc of a circle from which point the center of said circle bears South $60^{\circ} 01'$ East 3014.82 feet; thence along the arc of said circle for a dis-

tance of 616.14 feet to a point on the westerly boundary of a 40 acre tract conveyed to Elmer Johnson by Charles J. McConnell et al., by deed dated January 7, 1938, and recorded in Volume 127 at page 361, of the Official Records of Shasta County, distant North $35^{\circ} 00' 15''$ East 615.07 feet from the point of beginning on said arc; thence along said westerly boundary South $0^{\circ} 27'$ East 235.51 feet to Engineer's Station 4466+90.08 on aforesaid located center line; thence continuing along said westerly boundary South $0^{\circ} 27'$ East 257.37 feet to a point on the arc of a circle from which point the center of said circle bears South $56^{\circ} 58' 40''$ East 2714.82 feet; thence along said arc for a distance of 183.45 feet to a point which bears South $31^{\circ} 05' 10''$ West 183.41 feet from the point of beginning on said arc; thence South $27^{\circ} 03' 45''$ West 32.46 feet; thence South $27^{\circ} 10'$ West 260.76 feet; thence South $26^{\circ} 09'$ West 263.50 feet; thence South $26^{\circ} 08'$ West 228.34 feet; thence South $29^{\circ} 59' 30''$ West 155.86 feet; thence South $31^{\circ} 14'$ West 192.35 feet; thence South $37^{\circ} 02' 30''$ West 31.78 feet to a point on the northerly boundary of lands now or formerly belonging to Charles A. House; thence along said northerly boundary North $67^{\circ} 56'$ West 43.97 feet; thence along the northerly boundary of lands now or formerly of Kenneth Deakins, North $67^{\circ} 55'$ West 112.24 feet to the point of beginning; a portion of the

tract hereinabove described includes Lot One (1) and portions of Lots Two (2), Three (3) and Four (4) in Block One (1), Lot Four (4) and portions of Lots One (1), Two (2) and Three (3) in Block Two (2), portions of Lots One (1), Two (2), Seven (7) and Eight (8) in Block Seven (7), Lot One (1) and a portion of Lot Three (3) in Block Ten (10), of Boomtown Unit No. 4, portions of Chico Street, Main Street, North Boulevard, an alley in Block Seven (7) and Grand Coulee Boulevard, all as shown on a map entitled "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed May 16, 1938, in Volume 5 of Maps at page 26, in the office of the County Recorder of Shasta County. [22]

Saving and Excepting therefrom any such part of Lots One (1), Two (2) and Three (3) in Block Two (2) of said Boomtown Unit No. 4, condemned and taken in this action as Parcel Number 6, and that certain parcel of land embracing Lot Two (2) in Block Ten (10) of said Boomtown Unit No. 4, as said parcel was conveyed by Charles J. McConnell to Chester L. Barger by deed recorded July 8, 1938, in Volume 133 at page 309 of Official Records of Shasta County, condemned and taken in this action as Parcel Number 2, as may lie within the boundaries of the tract of land hereinabove described, and

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by that certain deed dated October 21, 1937, and recorded in Volume 2 of Rights of Way of Official Records of Shasta County at page 79.

That said tract of land so described embraces one (1) parcel of land and is a part of an entire parcel or tract or piece of property situate in Shasta County and State and Northern District, Northern Division of California and described as follows:

All that part of Lots Two (2), Three (3) and Four (4) in Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mouth Diablo Meridian, lying north of the county road, but excepting therefrom the East 638.85 feet of the West 1472.11 feet of the South 2780.11 feet of said Lots and also excepting therefrom Lots One (1), Two (2) and Three (3) in Block Two (2) of Boomtown Unit No. 4, as said Lots are shown on a "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed in the office of the County Recorder of Shasta County in Volume 5 of Maps at page 26, and that certain parcel of land embracing Lot Two (2) in Block Ten (10) of said Boomtown Unit No. 4, as said parcel was conveyed by Charles J. McConnell to Chester L. Barger by deed recorded July 8, 1938, in Volume 133

at page 309 of Official Records of Shasta County.

That the location and general route of the right of way sought, the termini thereof and the general relation of said right of way to the entire tract, of which it is a part, is shown for the above described parcel on the aforesaid plat marked Exhibit "B".

[23]

That the defendant Charles J. McConnell is the apparent and presumptive owner of the above described parcel.

That the defendants Victor N. Miller and John J. Humphrey, by virtue of that certain agreement dated September 16, 1937, and recorded September 12, 1938, in the office of the County Recorder of Shasta County, Series No. 3562, may have or claim to have some right, title or interest in and to the above described property, the extent and nature of which is to this plaintiff unknown.

That the defendant Charles J. McConnell, by virtue of certain tract restrictions as set out in that Declaration of Restrictions dated January 20, 1938, and recorded in Volume 129 of the Official Records of Shasta County at page 232, may have or claim to have some right, title or interest in and to the above described property, the extent and nature of which is to this plaintiff unknown.

That the defendant The County of Shasta, State of California, a political subdivision of the State of California, may have or claim some interest in

the foregoing parcel for unpaid taxes and assessments due against said parcel.

That the defendants to this Action, the purchasers of Lots in Boomtown Unit Number 4 and the public may have or claim to have some right, title or interest in and to those portions of Chico Street, Main Street, North Boulevard, an alley in Block Seven (7) and Grand Coulee Boulevard lying within the above described parcel. [24]

* * * * *

VIII.

That the estate or interest in and to said lands, hereinbefore described, which plaintiff intends and seeks to take, acquire, condemn, hold and own by this proceeding is that of owner in fee simple absolute, free and clear and discharged from all liens, encumbrances, servitudes, easements, charges, demands, claims, restrictions and covenants whatsoever subject to the exceptions hereinbefore stated.

IX.

That the purposes for which plaintiff is taking said land and the appurtenances thereto, are necessary and constitute a public use; and that the use to which said property is to be applied is a use authorized by law; that it is necessary that all of said land be so taken; that its acquisition by plaintiff is and will be of greatest public benefit and the least private injury; that said right of way is planned and located in a manner which will be most compatible with the greatest public good and

the least private injury; and that no part of the property herein sought to be taken and condemned [27] has heretofore been appropriated for public use by said plaintiff, or the State of California, or any political subdivision thereof, except those portions of said land as are being used for streets, alleys and roads; and that the use to which the plaintiff is to devote said land is paramount. [28]

* * * * *

FRANK J. HENNESSY

United States Attorney

R. B. McMILLAN

Assistant United States Attorney

Attorneys for Plaintiff. [29]

[Endorsed]: Filed Dec. 14, 1938. Walter B. Maling, Clerk. [30]

[Title of District Court and Cause.]

DECLARATION OF TAKING

I, Harry Slattery, Acting Secretary of the Interior of the United States, acting in such capacity, do hereby make and cause to be filed this Declaration of Taking under and in accordance with an Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U. S. C. 258a) and Acts supplementary thereto or amendatory thereof, and declare that:

First: (a) The land hereinafter described is taken pursuant to and under the authority of the provisions

of the Act of Congress approved June 17, 1902 (32 Stat. 388), and Acts amendatory thereof or supplementary thereto; the Act of Congress approved April 8, 1935 (49 Stat. 115); the Act of Congress approved June 22, 1936 (49 Stat. 1622); the Act of Congress approved August 26, 1937 (50 Stat. 844); and the Act of Congress approved May 9, 1938 (Public No. 497 - 75th Congress, Chapter 187 - 3d Session).

(b) The said land hereinafter described has been selected by me for acquisition by the United States for use in connection with the Central Valley Project, California, of the Bureau of Reclamation, United States Department of the Interior, and is required for immediate use.

(c) In my opinion, it is necessary, advantageous, and in the interest of the United States that said land be acquired by judicial proceedings as authorized by an Act of Congress approved August 1, 1888, and Acts amendatory thereof or supplementary thereto (25 Stat. 357; 40 U. S. C. 257, 258a).

(d) The public uses for which said land is taken are for the purposes prescribed in the aforesaid Acts of Congress.

Second: Pursuant to law, I have ascertained and selected for acquisition for the purposes prescribed by the [34] foregoing Acts of Congress the following described land situate in the County of Shasta, State of California: [35]

• • • • •

The aforesaid tract, piece or parcel of land contains seven (7) separate ostensible ownerships which are more particularly detailed and described as follows:

No. 1:

That certain tract, piece or parcel of land, as shown on the plat of survey marked Exhibit "C" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, in the southeast corner of Section Twenty-five (25) in Township Thirty-three (33) North, Range Five (5) West, of the Mount Diablo Meridian in Shasta County, California, which includes portions of Lots One (1), Two (2) and Three (3) in Block Thirteen (13), a portion of Givan Street, all of Lots One (1) and Ten (10) and portions of Lots Two (2), Three (3), Seven (7), Eight (8) and Nine (9) in Block Eleven (11), portions of County Road, Main Street, North Boulevard, and of a 15-foot lane, all as shown on a map entitled "Map of Boomtown Unit No. 5, Portion of South $\frac{1}{2}$ of Section 25, T. 33 N., R. 5 W., M. D. B. & M., Shasta County, California", filed in the office of the County Recorder of Shasta County on June 2, 1938, in Volume 5 of Maps at page 29; said tract is more particularly described as follows:

[37]

Beginning at a point on the south boundary of said Section 25 where the same is crossed by

the located center line of Central Pacific Railway Company's main track at Engineer's Station 4446+06.50 and which point bears South 87° 15' West 284.62 feet from the southeast corner of said Section 25, thence along said south boundary South 87° 15' West 237.46 feet; thence North 43° 43' 30" East 499.80 feet; thence North 39° 13' East 102.15 feet; thence North 35° 42' East 89.75 feet; thence North 31° 28' 20" East 103.81 feet to the east boundary of said Section 25; thence along said east boundary South 0° 29' East 266.45 feet to Engineer's Station 4450+35.99 on said located center line; thence continuing along said east boundary South 0° 29' East 310.07 feet to the southeast corner of said Section 25; thence along the south boundary of said Section 25 South 87° 15' West 284.62 feet to the point of beginning, and containing 3.17 acres.

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by deed dated November 1, 1937, and recorded November 12, 1937, in Volume 2 of Rights of Way, Shasta County Records at page 81, and

Subject to the easement of the Pacific Gas & Electric Company as conveyed by deed dated July 8, 1938, and recorded August 4, 1938, in the office of the County Recorder of Shasta County, Series No. 3021; and

Reserving to The County of Shasta an easement in and to that portion of the existing

county road, lying within the above described parcel, which was conveyed to the County of Shasta by that certain deed dated February 4, 1938, and recorded February 4, 1938, in Volume 132 of the Official Records of Shasta County at page 317. [38]

* * * * *

No. 4:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit "F" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, in Lot Three (3) of Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian and more particularly described as follows:

Beginning at the point where the located center line of the Central Pacific Railway Company's main track intersects the western boundary of that tract of land conveyed by Charles J. McConnell, et al., to Elmer Johnson by deed dated January 7, 1938, and recorded in Volume 127 at page 361 of Official Records of Shasta County, said point of beginning being at Engineer's Station 4466+90.08 on said center line and bears South 88° 38' East 833.91 feet, and South 0° 27' East 835.67 feet from the west quarter corner of said Section 30, thence North 0° 27' West 235.51 feet to a point on the arc of a circle from which point the center of said

circle bears South $49^{\circ} 08' 25''$ East 3014.82 feet; thence along said arc for a distance of 446.75 feet to a point which bears North $45^{\circ} 06' 18''$ East 446.33 feet from the point of beginning on said arc; thence North $49^{\circ} 49' 15''$ East 52.40 feet; thence North $50^{\circ} 59' 15''$ East 103.49 feet; thence North $52^{\circ} 05' 55''$ East 61.69 feet to a point on the western boundary of that tract of land conveyed by Elmer Johnson, et ux., to Leland R. Kronschnabel, et ux., by deed dated January 7, 1938, and recorded in Volume 140 at page 6 of Official Records of Shasta County; thence along said western boundary South $0^{\circ} 27'$ East 189.92 feet to Engineer's Station 4473+86.51 on aforesaid located center line; thence continuing along said western boundary South $0^{\circ} 27'$ East 194.79 feet to a point on the arc of a circle from which point the center of said circle bears South $41^{\circ} 18' 02''$ East 2714.82 feet; thence along said arc for a distance of 742.84 feet to a point on the western boundary of aforesaid tract of land conveyed to Elmer Johnson, which point bears South $40^{\circ} 51' 38''$ West 740.52 feet from the point of beginning on said arc; thence along said western boundary North $0^{\circ} 27'$ West 257.37 feet to the point of beginning and containing 4.81 acres. [41].

* * * * *

No. 6:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit

"H" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, in the Southwest Quarter (SW $\frac{1}{4}$) of Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian containing 0.02 acres and being all that part of Lots One (1), Two (2) and Three (3) in Block Two (2) of Boomtown Unit No. 4 as shown on a map entitled "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed May 16, 1938, in the office of the County Recorder of Shasta County in Volume 5 of Maps at page 26, described as follows:

Beginning at the southeasterly corner of [42] aforesaid Lot 1, distant radially North $63^{\circ} 07' 20''$ West 145.05 feet from Engineer's Station 4455+67.42 on the located center line of Central Pacific Railway Company's main track, thence along the south boundary of said Lot 1, West 5.82 feet; thence North $26^{\circ} 24'$ East 156.28 feet to the northeast corner of aforesaid Lot 3; thence along the easterly boundary of said Lot 3 South $18^{\circ} 36'$ East 7.37 feet to the most northerly corner of Lot 4 in aforesaid Block 2, thence along the southeasterly boundary of aforesaid Lots 3, 2 and 1 South $26^{\circ} 24'$ West 148.48 feet to the point of beginning.

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by that certain deed dated October 21, 1937, and recorded in Volume 2 of Rights of Way of the Official Records of Shasta County at page 79.

No. 7:

That certain tract, piece or parcel of land as shown on the plat of survey marked Exhibit "I" prepared by the Bureau of Reclamation, United States Department of the Interior, hereto attached and made a part hereof, situate in Lots Three (3) and Four (4) of Section Thirty (30), Township Thirty-three (33) North, Range Four (4) West of the Mount Diablo Meridian, containing 10.61 acres and more particularly described as follows:

Beginning at a point in the southern boundary of the lands of McConnell and the northern boundary of lands now or formerly belonging to Kenneth Deakins where said common boundary is intersected by the located center line of the Central Pacific Railway Company's main track at Engineer's Station 4450+94.92 distant North $0^{\circ} 29' 15''$ West 371.45 feet, and South $67^{\circ} 55'$ East 37.76 feet from the southwest corner of said Section 30, and running thence along said common boundary North $67^{\circ} 55'$ West 37.76 feet to the west boundary of said Section 30; thence along said west boundary North $0^{\circ} 29' 15''$ West 205.07 feet; thence North $30^{\circ} 31' 30''$ East 234.45 feet; thence

North $26^{\circ} 24'$ East 55.82 feet; thence continuing North $26^{\circ} 24'$ East 156.28 feet; thence North $26^{\circ} 09'$ East 389.85 feet; thence North $27^{\circ} 41' 15''$ East 121.47 feet; thence North $28^{\circ} 40' 40''$ East 52.40 feet to a point on the arc of a circle from which point the center of said circle bears South $60^{\circ} 51'$ East 3014.82 feet; thence along the arc of said circle for a distance of 616.14 feet to a point on the westerly boundary of a 40 acre tract conveyed to Elmer Johnson by Charles J. McConnell et al., by deed dated January 7, 1938, and recorded in Volume 127 at page 361, [43] of the Official Records of Shasta County, distant North $35^{\circ} 00' 15''$ East 615.07 feet from the point of beginning on said arc; thence along said westerly boundary South $0^{\circ} 27'$ East 235.51 feet to Engineer's Station 4466+90.08 on aforesaid located center line; thence continuing along said westerly boundary South $0^{\circ} 27'$ East 257.37 feet to a point on the arc of a circle from which point the center of said circle bears South $56^{\circ} 58' 40''$ East 2714.82 feet; thence along said arc for a distance of 183.45 feet to a point which bears South $31^{\circ} 05' 10''$ West 183.41 feet from the point of beginning on said arc; thence South $27^{\circ} 03' 45''$ West 32.46 feet; thence South $27^{\circ} 10'$ West 260.76 feet; thence South $26^{\circ} 08'$ West 228.34 feet; thence South $29^{\circ} 59' 30''$ West 155.86 feet; thence South $31^{\circ} 14'$ West 192.35 feet; thence

South 37° 02' 30" West 31.78 feet to a point on the northerly boundary of lands now or formerly belonging to Charles A. House; thence along said northerly boundary North 67° 56' West 43.97 feet; thence along the northerly boundary of lands now or formerly of Kenneth Deakins, North 67° 55' West 112.24 feet to the point of beginning; a portion of the tract hereinabove described includes Lot One (1) and portions of Lots Two (2), Three (3) and Four (4) in Block One (1), Lot Four (4) and portions of Lots One (1), Two (2) and Three (3) in Block Two (2), portions of Lots One (1), Two (2), Seven (7) and Eight (8) in Block Seven (7), Lot One (1) and a portion of Lot Three (3) in Block Ten (10), of Boomtown Unit No. 4, portions of Chico Street, Main Street, North Boulevard, an alley in Block Seven (7) and Grand Coulee Boulevard, all as shown on a map entitled "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed May 16, 1938, in Volume 5 of Maps at page 26, in the office of the County Recorder of Shasta County.

Saving and Excepting therefrom any such part of Lots One (1), Two (2) and Three (3) in Block Two (2) of said Boomtown Unit No. 4, condemned and taken in this action as Parcel Number 6, and that certain parcel of land embracing Lot Two (2) in Block Ten (10) of

said Boomtown Unit No. 4, as said parcel was conveyed by Charles J. McConnell to Chester L. Barger by deed recorded July 8, 1938, in Volume 133 at page 309 of Official Records of Shasta County, condemned and taken in this action as Parcel Number 2, as may lie within the boundaries of the tract of land hereinabove described, and

Subject to the easement of the Pacific [44] Telephone and Telegraph Company as conveyed by that certain deed dated October 21, 1937, and recorded in Volume 2 of Rights of Way of Official Records of Shasta County at page 79.

Third: The estate taken for said public uses is the full fee simple title thereto of the land hereinabove described subject to the easements hereinbefore stated.

Fourth: The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereunto belonging, and including any and all interest whatsoever subject to the easements hereinbefore stated, is Ten Thousand Three Hundred Sixty and No/100 (\$10,360.00) Dollars, which sum is divided into \$300.00 for said Ownership 1, \$5,700.00 for said Ownership 2, \$1,110.00 for said Ownership 3, \$510.00 for said Ownership 4, \$140.00 for said Ownership 5, \$50.00 for said Ownership 6 and \$2,550.00 for said Ownership 7, which sum I hereby deposit in the Registry of this Court for the use and bene-

fit of the parties entitled thereto. I am of the opinion that the ultimate award for said land will probably be within the limits of allocations and allotments made and provided for the purchase of said land.

In Witness Whereof, I have signed this Declaration of Taking and caused the seal of the Department of the Interior to be affixed on this 9th day of November, A. D., 1938, in the City of Washington, District of Columbia.

[Seal] HARRY SLATTERY

Acting Secretary of the Interior of the United States of America.

[Endorsed]: Filed Dec. 14, 1938. Walter B. Maling, Clerk. [45]

[Title of District Court and Cause.]

JUDGMENT ON THE DECLARATION
OF TAKING

This day comes the plaintiff in the above-entitled cause, the United States of America, by Frank J. Hennessy, United States Attorney, and moves the Court to enter judgment vesting title in the United States of America in fee simple absolute in and to the property hereinafter described in the declaration of taking and in the amended complaint in condemnation on file herein, and for an order fixing the date when the property herein described is to be surrendered to the United States of America.

Thereupon the Court proceeded to hear and pass upon said motion, amended complaint, and declaration of taking and finds as follows:

First, That the United States of America is entitled to acquire property by eminent domain for necessary public purposes and uses of the United States as set out and prayed in said amended complaint;

Second, That an amended complaint in condemnation was filed at the request of the Secretary of the Interior of the United States, the authority empowered by law to acquire the land described in said amended complaint, and also under authority of the Attorney General of the United States;

Third, That in said amended complaint and declaration of taking a statement of authority, under which, and the public use for which, said land was taken was set out both in the declaration of taking and in the amended complaint in condemnation, and that the Secretary of the Interior of the United States is the person duly authorized and empowered by law to acquire land, such as is described in the amended complaint for necessary public purposes and uses of the United States of America, and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings; [49]

Fourth, That a proper description of the land sought to be taken sufficient for the identification thereof is set out in said declaration of taking;

Fifth, A statement of the estate or interest in said land taken for said public use was set out therein;

Sixth, A plan showing the land taken was set out;

Seventh, A statement of the sum of money estimated by said acquiring authority to be just compensation for the lands taken in the amount of \$10,360.00;

Eighth, A statement in said declaration of taking that the estimated award of damages for the taking of said property, in the opinion of said Secretary of the Interior of the United States, will probably be within any limits prescribed by Congress as a price to be paid therefor.

And the Court, having fully considered said amended complaint in condemnation and declaration of taking, and the statutes in such cases made and provided, is of the opinion that the United States of America is entitled to take said property and have the title thereto vested in it in fee simple absolute pursuant to the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U. S. C. 258a).

It is, therefore, considered by the Court and it is the order, judgment and decree of the Court that the title to the following described land in fee simple absolute be and the same is hereby vested in the United States of America, and said land is deemed to be condemned and taken and is condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto when said compensation shall be ascertained and awarded in

this proceeding and established by judgment thereunder pursuant to law.

Said land is situate in the County of Shasta, State of California, and is more particularly described as follows: [50]

That certain tract, piece or parcel of land in the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-five (25), in Township Thirty-three (33) North, Range Five (5) West, and in Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian, containing an area of 33.396 acres and more specifically described as follows:

Here follows a description of land described in amended complaint. [51]

Subject to the easement of the Pacific Telephone and Telegraph Company as conveyed by that certain deed dated October 21, 1937, and recorded in Volume 2 of Rights of Way of Official Records of Shasta County at page 79.

That the plaintiff, United States of America, is entitled to and its duly authorized agents and officers shall take and be let into possession of said Parcel 2 of land hereby acquired, taken and condemned for its use, and the possession thereof shall be delivered to the United States of America, and the defendants and/or any person or persons [59] claiming to have any interest in said above described parcel, or any part thereof, or any person or persons in possession of said land and appur-

tenances or any part thereof, are all and singular hereby ordered and directed forthwith to surrender possession of said parcel to the United States of America on or before the 1st day of February, 1939.

That the plaintiff, United States of America, is entitled to and its duly authorized agents and officers shall take and be let into immediate possession of the remainder of said pieces, parcels and tracts of land, hereby acquired, taken and condemned for its use, and the possession thereof shall be delivered immediately to the United States of America, and the defendants and/or any person or persons claiming to have any interest in said above described land, or any part thereof, or any person or persons in possession of said land and appurtenances or any part thereof, are all and singular hereby ordered and directed forthwith to surrender possession of said lands to the United States of America;

That the said sum of money, to-wit, \$10,360.00, so deposited in the registry of this Court, as afore-said, be held for the further orders of this Court for its distribution, and that said cause be held open for such other and further orders, judgments and decrees of this Court as may be just and equitable in the premises.

Done in open Court this 14th day of December, 1938.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Dec. 14, 1938. Walter B. Maling, Clerk. [60]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER, JOHN J. HUMPHREY, ALSO KNOWN AS J. J. HUMPHREY, ALSO KNOWN AS JOHN J. HUMPHREY, SR.

Comes now the above named defendants, Victor N. Miller, also known as Vic Miller, John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., and each of them, and answering unto plaintiff's Amended Complaint, on file in the above entitled action, deny and allege as follows:

I.

Answering unto paragraph IV of said Amended Complaint, said defendants allege that they have no information or belief as to the allegations therein contained sufficient to enable them to answer the same, and placing their denial on that ground deny each and every, all and singular, the allegations therein contained. [61]

II.

Answering unto paragraph VIg said defendants deny that defendant Charles J. McConnell is the apparent and/or presumptive owner of said parcel No. 7 and in this connection said defendants allege that these answering defendants and said Charles J. McConnell are the owners of said parcel No. 7 as tenants in common and in equal shares; said defendants deny that the County of Shasta, State of

California, a political subdivision of the State of California, has or claims any interest in said parcel No. 7 for unpaid taxes and/or assessments due against said parcel.

III.

Said defendants allege that said parcel No. 7 sought to be taken and condemned herein is a part, parcel and portion of the following described parcel or tract of land belonging to and owned by these answering defendants and said Charles J. McConnell as tenants in common and in equal shares situated in the County of Shasta, State of California, and Northern District, Northern Division of the State of California, and more particularly described as follows, to wit:

"All that part of Lots Two (2), Three (3) and Four (4) in Section Thirty (30) in Township Thirty-three (33) North, Range Four (4) West, of the Mount Diablo Meridian, lying north of the county road, but excepting therefrom the East 638.85 feet of the West 1472.11 feet of the south 2780.11 feet of said Lots and also excepting therefrom Lots One (1), Two (2) and Three (3) in Block Two (2) of Boomtown Unit No. 4, as said Lots are shown on a "Map of Boomtown Unit No. 4, Portion of S. W. $\frac{1}{4}$ of Section 30, T. 33 N., R. 4 W., M. D. B. & M., Shasta County, California", filed in the office of the County Recorder of [62] Shasta County in Volume 5 of Maps at page 26, and that certain parcel of land em-

bracing Lot Two (2) in Block Ten (10) of said Boomtown Unit No. 4, as said parcel was conveyed by Charles J. McConnell to Chester L. Barger by deed recorded July 8, 1938, in Volume 133 at page 309 of Official Records of Shasta County".

also all water, water rights, dams, flumes, ditches, pipelines and rights of way used in connection with the above described property.

IV.

Said defendants allege that said property described in said Amended Complaint and designated as parcel No. 7, and which is sought to be taken and condemned herein is of the value of \$25,000.00, and that the damage to the remaining portion not sought to be condemned of the land herein above described, by reason of the severance thereof from the land sought to be condemned, and the construction of said railroad and alleged improvement in the manner proposed by plaintiff will be the sum of \$15,000.00.

V.

Answering unto paragraph VII of said Amended Complaint, said defendants deny each and every, all and singular, the allegations therein contained, commencing with the word "That" in line 32, page 26-c, and continuing to the word "complaint" in line 13, page 27-c of said Amended Complaint.

Wherefore, said defendants, and each of them, pray judgment as follows:

1. That said defendants be awarded damages in the sums and in the amounts hereinabove specified for the taking and the damaging of their said lands as hereinabove specified.

2. That the plaintiff give to said defendants the damages awarded said defendants within the time prescribed by [63] law, from the time of said award, and that in the event that said payment is not made within said time, this Honorable Court issue a restraining order restraining said plaintiff and its agents, servants and employees, and all other persons acting in aid or assistance of it, from in any manner taking said land or right of way or any part thereof.

3. That said defendants, and each of them, be awarded their costs of suit incurred herein, together with such other and further relief as to the court may seem meet and proper.

CARTER, BARRETT, FINLEY & CARLTON

Attorneys for said Defendants

JESSE W. CARTER

Redding, California. [64]

[Endorsed]: Filed May 22, 1939. Walter B. Maling, Clerk.

[Title of District Court and Cause.]

**ANSWER OF CHARLES J. McCONNELL, ALSO
KNOWN AS CHAS. J. McCONNELL, TO
AMENDED COMPLAINT**

Comes now the defendant Charles J. McConnell, also known as Chas. J. McConnell, and answers the amended complaint of plaintiff herein as follows:

I.

Answering the allegations of paragraph IV of said [66] amended complaint said defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of such allegations, and basing his denial upon such lack of knowledge, information and belief, defendant denies each and every, all and singular the allegations contained in said paragraph IV.

II.

Answering the allegations of paragraph VIg of said amended complaint said defendant admits that the parcel of land therein described as parcel No. 7 is a part of the entire parcel or tract of real property situate in Shasta County, California, described in said paragraph of said amended complaint on page 23-c thereof;

Admits that he is the owner of record of said tract of land designated as parcel No. 7, subject, however, to the provisions of the agreement between said defendant, Victor N. Miller and John J. Humphrey, dated September 16, 1937, mentioned in said paragraph of the amended complaint; admits

that, subject to the provisions of said agreement, the defendants Victor N. Miller and John J. Humphrey have, and claim to have, some right, title and interest in and to said parcel of real property, viz.: undivided one-third interests therein, subject to the terms and provisions of the agreement aforesaid;

Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in said paragraph that the County of Shasta, State of California, may have or claim some interest in said parcel of land for unpaid taxes and assessments due against said parcel of land, and basing his denial upon such lack of knowledge, information and belief, defendant denies said averment of said amended complaint.

III.

Defendant alleges that the real property described in said amended complaint and designated as parcel No. 7, and which [67] is sought to be taken and condemned herein is of the value of Twenty-five Thousand and no/100 (\$25,000.00) Dollars, lawful money of the United States, and that the damage to the remaining portion of the larger tract of real property of which same is a part, as alleged in said amended complaint, by reason of the severance thereof from the land sought to be condemned, and the construction of said railroad and alleged improvements in the manner proposed by plaintiff will be the sum of Fifteen

Thousand and no/100 (\$15,000.00) Dollars, lawful money of the United States.

IV.

Answering the allegations of paragraph VII of said amended complaint said defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of such allegations, and basing his denial upon such lack of knowledge, information and belief, defendant denies each and every, all and singular the allegations contained in said paragraph VII.

V.

Answering the allegations of paragraph IX of said amended complaint defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph of said complaint, commencing with the words "that it is necessary" in line 26 of page 27-c and continuing to the words "private injury" in line 31 of said page; and basing his denial upon such lack of knowledge, information and belief defendant denies generally and specifically, each and every, all and singular, said allegations of said paragraph IX of said amended complaint;

Wherefore defendant prays judgment:

1. That said defendant be awarded damages in the sums and in the amounts hereinabove specified for the taking and the damaging of his said lands as hereinabove specified, together with interest thereon. [68]

2. That said defendant be awarded his costs of suit incurred herein, together with such other and further relief as to the court may seem meet and proper.

CARR & KENNEDY

Attorneys for said defendant.

[69]

[Endorsed]: Filed August 25, 1939. Walter B. Maling, Clerk. [70]

[Title of District Court and Cause.]

**ANSWER OF DEFENDANTS,
ELMER JOHNSON and HILMA JOHNSON**

Come now the defendants, Elmer Johnson and Hilma Johnson, his wife, and each of them, and answering unto plaintiff's Amended Complaint on file in the above action, admit, deny and allege as follows:

I.

Answering unto paragraph I of plaintiff's Amended Complaint said defendants and each of them, allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular the allegations therein [71] contained;

II.

Answering unto paragraph III of plaintiff's Amended Complaint, said defendants and each of

them, allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular the allegations therein contained;

III.

Answering unto paragraph IV of plaintiff's Amended Complaint, said defendants and each of them, allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular the allegations therein contained;

IV.

Answering unto paragraph V of plaintiff's Amended Complaint, said defendants and each of them, allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular the allegations therein contained;

V.

Answering unto paragraph VI of plaintiff's Amended Complaint, said defendants, and each of them, allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular the allegations therein contained; [72]

VI.

Answering unto paragraph VI^d of said Amended Complaint, said defendants and each of them admit that they are the owners of the property described and designated as number 4 in said paragraph VI^d, and deny that Charles McConnell claims and/or owns some and/or any right and/or title and/or interest in said parcels of lands, other than those reservations and interests which are set forth in that certain deed dated January 7, 1938, and recorded in Volume 127 of Official Records of Shasta County, page 361, to which records reference is hereby made and said record is by this reference made a part of this answer; defendants further admit that no other persons, other than those mentioned in said paragraph VI^d, have any interest in said parcel of land described therein;

VII.

Answering unto the remainder of paragraph VI^d, said defendants and each of them allege that they have no information or belief sufficient to enable them to answer allegations therein contained and basing their denial upon that ground, deny each, every, all and singular, the allegations therein contained;

VIII.

Answering unto paragraph IX of plaintiff's Amended Complaint said defendants and each of them, allege that they have no information or belief sufficient to enable them to answer allegations

therein contained and basing their denial upon that ground deny each, every, all and singular the allegations therein contained;

IX.

Said defendants, Elmer Johnson and Hilma Johnson, his wife, and each of them, allege said property and right-of-way, [73] sought to be condemned and described in plaintiff's amended complaint as parcel 4, paragraph VI*d*, is a part and parcel and portion of the following described tract of land belonging to the said defendants and each of them, situated in the County of Shasta, State of California, Northern District, Northern Division of California, and described as follows:

Beginning at a 1" iron pipe set on the south line of Section 30, Township 33 North Range 4 West, M. D. M., whence the southwest corner of said Section 30, bears North 87° 58' 20" West a distance of 1472.07 feet, and running thence South 2630.95 feet, thence South 72° 10' East 437.36 feet, thence South 87° 58' 20" East 222.64 feet to the point of beginning. Being a portion of Lots 2, 3 and 4 of Section 30, Township 33 North, Range 4 West, M. D. M. and containing 40.0 acres, more or less.

Save and except road right-of-way conveyed to the County of Shasta; also save and except easterly 150 feet conveyed by Elmer Johnson et ux to L. R. Kronschnabel et ux by deed dated January 7, 1938, and recorded in Volume 140

of Official Records at page 6, County of Shasta, State of California.

also all water, water rights, dams, flumes, ditches, pipelines, easements and rights-of-way used in connection with the above-described property; [74]

X.

That the property and rights-of-way described in said Amended Complaint and designated as parcel number 4; of Paragraph VIId and is sought to be taken and condemned herein, is of the value of \$600.00 per acre, and that the damages to the remaining portion not sought to be taken and condemned of the lands herein above described, by reason of the severance thereof from the land sought to be condemned and the construction of said railroad right-of-way and alleged improvements in the manner proposed by plaintiff will be, and is, the sum of \$5,000.00;

Further Answering Unto Said Amended Complaint and As a Further, Separate Defense to the Said Complaint, Defendants, Elmer Johnson and Hilma Johnson, His Wife, and Each of Them Allege As Follows:

1.

That the premises and right-of-way set forth in plaintiff's amended complaint as parcel number 4, paragraph VIId, is not necessary for a right-of-way of said railroad as alleged in said [75] complaint and that said right-of-way as surveyed and de-

scribed in said complaint as parcel number 4, paragraph VI*d*, has not been surveyed and located in a manner that will be most compatible with the greatest public good and the least private injury and that said right-of-way as surveyed, determined and located will cause great and irreparable injury and damage to defendants, Elmer Johnson and Hilma Johnson, his wife, and their said lands;

Wherefore, said defendants and each of them, pray judgment as follows:

1. That said defendants be awarded damages in the sum of \$600.00 per acre for the land sought to be condemned by plaintiff in said complaint and described as parcel number 4, paragraph VI*d*, thereof and belonging to the said defendants; [76]

2. That said defendants be awarded damages in the sum of \$5,000.00 for damages resulting to the remainder of said land not sought to be condemned by reason of the severance thereof from the portion sought to be condemned and the construction of said right-of-way and improvement in the manner proposed by plaintiff in said complaint;

3. That it be adjudged and decreed that said right of way described and sought to be taken and condemned in plaintiff's complaint is not necessary for the purpose mentioned therein and that the same has not been surveyed and located in the manner which will be most compatible with the greatest public good and the least private injury;

4. That said defendants and each of them be awarded their costs of suit incurred, together with

any other costs allowed by law, together with such other and further relief as to this Court may seem just and proper.

R. P. STIMMEL

Attorney for defendants,
Elmer Johnson and
Hilma Johnson, [77]

[Endorsed]: Filed May 4, 1939. Walter B. Maling, Clerk. [78]

[Title of District Court and Cause.]

ANSWER OF DAVID WILSON AGNEW

Comes now the defendant David Wilson Agnew and answers the amended complaint in Eminent Domain, filed by plaintiff as follows:

I.

Defendant admits the allegations contained in paragraphs I and III of said amended complaint.

Defendant alleges that he is without knowledge or [79] information sufficient to form a belief as to the truth of the allegations contained in paragraphs II, IV, V, VII and IX of said amended complaint, and placing his denial upon that ground, defendant denies all and singular the allegations of said paragraphs of said amended complaint.

II.

Answering paragraph VI of said amended complaint defendant alleges:

That defendant is the owner of the parcel of land described in sub-paragraph VI^f of said amended complaint, commencing on line 31 of page 19-c and ending on line 15 of page 20-c;

That it is true that said tract of land is a part of an entire parcel or tract of real property situate in Shasta County, in the Northern District of California, Northern Division, more particularly described on page 20-c of said amended complaint, lines 25 to 29 thereof;

Denies that the defendants Victor N. Miller and John J. Humphrey, or either of said defendants, has any right, title or interest in and to the above described real property;

Defendant alleges that he has been the owner of said parcel or tract of land particularly described on page 20-c, lines 25 to 29, of said amended complaint since the 21st day of July, 1938;

That upon said tract of land defendant has constructed, at large expense, an amusement resort, consisting of a dance hall, 60 feet in length by 88 feet in width, together with a well, pumping plant and tank house, and septic tank, all of which improvements comprise one enterprise; and said well, pumping plant and tank house and septic tank are necessary in the operation of said amusement resort;

That said well is of the depth of seventy (70) feet and from said well water is derived for the uses of defendant in the [80] operation of said enterprise; that said well is also used by defendant as a cistern

for the storage of water saved by defendant from the natural rainfall; that said well is equipped with a pump operated by electric power and is connected with pipes leading to said tank house and to said amusement resort above described, and said well, pump, tank house and water system constitute the sole and only supply of water upon said premises of defendant or appurtenant or available thereto; and that without said well defendant has no water supply available to him in the operation of said amusement resort;

That said well is situate upon said land of defendant immediately adjacent to the strip of land, which plaintiff seeks to condemn described in paragraph VI of said amended complaint commencing on line 31 of page 19-c and extending to line 15 of page 20-c; that defendant is informed and believes and upon such information and belief hereby alleges that upon the condemnation of the right of way across his premises and the excavation to be made for said right of way and the operation of a railroad thereon, said well will be drained and rendered useless, and defendant will thereby suffer the loss of the water supply now available to him from the use of said well; in this behalf defendant alleges that said well was located and dug by him in said position on said premises, which was the only place thereon where defendant found any water supply, at a time when the defendant was informed and believed, as a result of investigating the public records, that the location and general

route of the projected right of way for the relocation of the main line of the Central Pacific Railway Company would be at a distance of from fifty-five (55) to sixty (60) feet easterly from the place where said well is dug; and acting upon such information and belief said well was sunk by defendant at a cost of One Thousand and Seventeen (\$1017.00) Dollars.

That the septic tank constructed and used by defendant [81] in the operation of said amusement resort is situate, in part, upon the stretch of land particularly described in paragraph VI of commencing on line 31 of page 19-c and extending to line 15 of page 20-c, which is the property plaintiff seeks to condemn, and the proposed excavation of said right of way and construction of a railroad thereon will result in the destruction of said septic tank;

That the land described in paragraph VI of said amended complaint sought to be condemned herein, with said septic tank, is of the value of Two Hundred (\$200) Dollars;

That the remainder of the entire parcel or tract of land owned by defendant, described on page 20-c, lines 25 to 29, together with the improvements constructed thereon and hereinabove described, is of the value of Fifteen Thousand (\$15,000.) Dollars.

That the excavation proposed to be made for said right of way for said railroad will be so close to the rear of defendant's building that it will necessitate defendant's reconstructing the rear entrance to

said amusement resort, and the disturbance and annoyance arising from the location of said railroad in such close proximity to said building will prevent defendant from using the basement of his building for an apartment or using or renting same for other purposes to which it is adapted; and by reason of such disturbance and annoyance arising from the location and operation of a railroad over said right of way the business and patronage of said amusement resort, which is the use for which said property is adapted, will be curtailed to defendant's further injury and damage; that by reason of the taking of said right of way and the excavation of same for the construction of a railroad the parking area surrounding said premises of defendant, which is essential in the operation of said amusement resort, will be greatly reduced and access to said resort will be cut off and seriously hindered. [82]

That the damage suffered by defendant by reason of the severance of the land embraced in said right of way and described in paragraph VI f, and the impairing of defendant's well and water supply upon said premises, and the establishment thereon of railroad tracks and side tracks, and the operation of a railroad thereon is the sum of Forty-eight Hundred (\$4800.00) Dollars, lawful money of the United States.

Defendant further alleges that he is one of the purchasers of lots in Boomtown Unit No. 4 and admits that as such purchaser of lots in said subdivision he has and claims to have some right, title

and interest in and to those portions of Chico Street, Main Street, North Boulevard, and Grand Coulee Boulevard, lying within parcel No. 7 of the land described in said complaint;

Alleges that he is an abutting owner on said Chico Street and said North Boulevard, and it is through and over said streets that defendant has access to the general system of streets in said vicinity and particularly to said Grand Coulee boulevard the main thoroughfare and principal business district of Central Valley, and it is through and over said streets that defendant's customers travel in going to and leaving the amusement resort operated by defendant as hereinabove alleged, and their only means of ingress to and egress from said resort; alleges that as a result of the condemnation of said parcel No. 7 and the excavation of the proposed right of way for the Central Pacific Railway Company, and the construction and operation of said railroad, said Chico Street and said North Boulevard will be so obstructed as to deprive defendant of convenient access, or any access, from his said property to the general system of streets and the business district of Central Valley, and prevent ingress to and egress from defendant's amusement resort by his customers in vehicles or otherwise; that defendant will thereby suffer serious injury and damage in being deprived of the profits he would otherwise derive from the operation of said [83] business, and as defendant is informed and believes, he will be

required to purchase rights of way over private lands in order that he and his customers may have safe and convenient ingress to and egress from said amusement resort, all to defendant's further damage in the sum of Ten Thousand (\$10,000.00) Dollars.

Defendant further alleges that he is and at the time of the commencement of this action was, the owner and holder of a Deed of Trust of the real property particularly described as Block 1 of Boomtown Subdivision Unit No. 4 in the County of Shasta, State of California, as security for the payment to him of an obligation of Shasta Tunnel and Construction Worker's Local #260, owner of said block, upon which there is now due the sum of Forty-six Hundred and One and 89/100 (\$4601.89) Dollars, which Deed of Trust is on record in the office of the County Recorder of the County of Shasta, State of California; that said real property is improved with a frame building of the dimensions of fifty (50) feet by seventy (70) feet, and other improvements, erected at a cost of Forty-nine Hundred and Six and 34/100 (\$4906.34) Dollars, which building is used as a meeting hall and for offices of said Shasta Tunnel and Construction Worker's Local #260; that said Block 1 of Boomtown Subdivision Unit No. 4 abuts on Chico Street and North Boulevard and it is through and over said streets that the persons using said property have access to the general system of streets in said vicinity and particularly to said Grand Coulee

Boulevard, which is the main thoroughfare and principal business district of Central Valley; that as a result of the excavation of the proposed right of way for the Central Pacific Railway Company, and the construction and operation of said railroad, said Chico Street and said North Boulevard will be so obstructed as to prevent ingress to and egress from the above described premises and said real property will become valueless and defendant will thereby suffer injury and damage in the loss and destruction of his security for said [84] indebtedness of Forty-six Hundred and One and 89/100 Dollars (\$4601.89) to defendant's further damage in said sum of *Forty-six and One and 89/100* (\$4601.89) Dollars.

IV.

Defendant denies each and every other allegation contained in said complaint.

Wherefore, defendant prays judgment:

1. That if the court shall award judgment in favor of plaintiff and the right to condemn and take said right of way as in said complaint particularly described, said defendant have judgment for damages in the sum of Nineteen Thousand Six Hundred and One and 89/100 (\$19,601.89) Dollars, and his costs of suit herein.

CARR & KENNEDY

Attorneys for said Defendant
David Wilson Agnew. [85]

[Endorsed]: Filed Apr. 6, 1939. [86]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
ALBERT ROUGE

Comes now the defendant, Albert Rouge, and answering unto plaintiff's amended complaint of file herein, admits, denies and alleges as follows:

I.

Answering unto paragraph I of plaintiff's amended complaint said defendant alleges that he has no information or belief sufficient to enable him to answer the allegations therein contained and basing his denial upon that ground, denies each, every, all and singular the allegations therein contained;

II.

Answering unto paragraph III of plaintiff's amended complaint, said defendant alleges that he has no information or [87] belief sufficient to enable him to answer allegations therein contained and basing his denial upon that ground, denies, each, every all and singular the allegations therein contained;

III.

Answering unto paragraph IV of plaintiff's amended complaint, said defendant alleges that he has no information or belief sufficient to enable him to answer allegations therein contained and basing his denial upon that ground, denies, each, every, all and singular the allegations therein contained;

IV.

Answering unto paragraph V of plaintiff's amended complaint, said defendant alleges that he has no information or belief sufficient to enable him to answer the allegations therein contained and basing his denial upon that ground, denies each, every, all and singular the allegations therein contained;

V.

Answering unto paragraph VI of plaintiff's amended complaint, said defendant alleges that he has no information or belief sufficient to enable him to answer the allegations therein contained and basing his denial upon that ground, denies each, every, all and singular the allegations therein contained;

VI.

Answering unto paragraph VIa of plaintiff's amended complaint, this defendant admits that he is owner of portions of property described as parcel number one in said paragraph VIa of the amended complaint, which property is particularly described as follows, to-wit:

“Beginning at the southeast corner of Block 6 of Boomtown Unit No. 5 Subdivision Shasta County as the same appears on the official map of Boomtown Unit No. 5, records of Shasta County, and running thence E 40.0 feet, thence N 0°31'14" W on and along the east line of Sec. 25, Tp. 33 N. R. 5 W., M. D. B & M. 81.78 feet, thence in a southwesterly direction along a

curve to the right with a radius of 2714.82 feet through an angle of $1^{\circ}31'28''$ 72.22 feet to the E line of Block 6 of said Boomtown Unit No. 5; thence $S\ 0^{\circ}31'14''\ E$ on and along the E line of said Block 621.20 feet to the point of beginning. Being a portion of a reserved right of way through said Boomtown Unit No. 5 Subdivision and containing 0.047 acres more or less. [88]

and answering unto the rest and remainder of said paragraph, admits that this defendant claims an interest in and to that portion of the county road therein described and as to the rest and remainder of said paragraph VIa of said amended complaint; this defendant alleges that he has no knowledge or information sufficient to enable him to answer the rest of the allegations therein contained and basing his denial on that basis and ground, this defendant denies each, every, all and singular the allegations therein contained;

VII.

Answering unto paragraph IX of plaintiff's amended complaint, this defendant alleges that he has no information or belief sufficient to enable him to answer the allegations therein contained and basing his claim upon that ground denies, generally and specifically, each, every, all and singular the allegations therein contained;

VIII.

That this defendant alleges said property and right of way described in said paragraph VI of this

answer so sought to be condemned is a part, and parcel of the portion of land belonging to the defendant situated in the County of Shasta, State of California, Northern District; Northern Division, and more particularly described as follows:

"Beginning at the northeast corner of Block 6, Boomtown Unit No. 5 Subdivision, Shasta County, California, as per plat filed in the office of the County Recorder, Shasta County, California, and running thence East 40.0 feet to the east line of Section 25, Township 33 North Range 5 West, M. D. B. & M. thence South 0°31'14" East on and along the east line of said Section 25 640.01 feet to the northerly line of Main Street, thence West on and along the North line of Main Street 40.0 feet, thence W. 640.01 feet to the point of beginning.

Containing 0.588 acres, more or less."

also all water, water rights, dams, flumes, ditches, pipelines, easements and rights of way used in connection with the above described property; [89]

IX.

That the property and right of way described in said amended complaint and designated as parcel number one in said paragraph VIa, which portion thereof is particularly described in paragraph six of this answer and is sought to be taken and condemned herein, is of the value of \$500.00 and that the damages to the remaining portion described in paragraph eight of this answer, not sought to be

taken and condemned by reasons of the severance thereof from the land sought to be condemned and the construction of the said railroad right of way and alleged improvements in the manner proposed by plaintiff will be, and is, of the sum of \$2,000.00:

And further answering unto said amended complaint, and as a further, separate defense to the said complaint, defendant, Albert Rouge, alleges as follows:

I.

That the portion of the premises and right of way described in paragraph six of this defendant's answer, or any portion of the parcel described in paragraph VIa is not necessary for a right of way of said railroad as alleged in said amended complaint and that said portion of the said right of way as described in said amended complaint as parcel number one of the paragraph designated as VIa has not been surveyed and located in a manner that will be most compatible with the greatest public good and the least private injury and that said right of way as surveyed, determined and located will cause great and irreparable injury and damage to defendant, Albert Rouge, and his lands; [90]

Wherefore, said defendant prays judgment as follows:

1. That said defendant be awarded damages in the sum of \$500.00 for the land sought to be condemned by plaintiff and described in said amended complaint as parcel number one in paragraph VIa of the said amended complaint, and belonging to the said defendant;

2. The said defendant be awarded damages in the sum of \$2000.00 for damages resulting to the remainder of said land not sought to be taken and condemned by reasons of the severance thereof from the portion sought to be condemned and the construction of said right of way and improvement in the manner proposed by plaintiff in said complaint;

3. That it be adjudged and decreed that said right of way described and sought to be taken and condemned in plaintiff's amended complaint is not necessary for the purpose mentioned therein and that the same has not been surveyed and located in the manner which will be most compatible with the greatest public good and the least private injury; and

4. That said defendant be awarded his costs of suit incurred herein, together with any other costs allowed by law, together with such other and further relief as to this Court may seem just and proper in the premises.

R. P. STIMMEL

Attorney for Defendant,

Albert Rouge [91]

[Endorsed]: Filed Dec. 14, 1939. [93]

[Title of District Court and Cause.]

**ANSWER OF DEFENDANT
FLORENCE VAN SANTEN**

Comes now the above named defendant, Florence Van Santen and answering unto plaintiff's

Amended Complaint on file in the above entitled action, denies and alleges as follows:

I.

Answering unto paragraph IV of said Amended Complaint, said defendant alleges that she has no information or belief as to the allegations therein contained sufficient to enable her to answer the same, and placing her denial on that ground denies each and every, all and singular, the allegations therein contained.

II.

Answering unto paragraph VIa of said Amended Complaint defendant alleges that she is the owner of a lease on the [94] hereinafter-described property; that said lease is for a period of ten years; that said defendant is now entitled to the possession of said property for the period from date hereof to and including the 23rd day of April, 1948; that said defendant at the time of the commencement of this action was the owner of an option to purchase said property; that said property hereinabove referred to is situated in the County of Shasta, State of California, and Northern District, Northern Division of the State of California, and more particularly described as follows, to wit:

Lot 2 of Block 11 of Boomtown Subdivision, Unit No. 5 as per map and plat thereof recorded in the office of the County Recorder of the County of Shasta, State of California.

III.

Said defendant alleges that said parcel No. I described in plaintiff's Amended Complaint and sought to be taken and condemned herein includes a portion of the property hereinabove described in paragraph II and said defendant alleges that said property sought to be taken and condemned herein and which said defendant has an interest herein as hereinabove set forth and which is a portion of the property hereinabove described in paragraph II is a part, parcel and portion of said entire property hereinabove described in paragraph II.

IV.

Said defendant alleges that the value of her said interest in the property hereinabove mentioned and described in paragraphs II and III and which is a portion of parcel No. I mentioned and described in plaintiff's Amended Complaint and which is sought to be taken and condemned herein is of the value of \$300.00 and that the damage to the remaining portion not sought to be condemned of the land hereinabove described in paragraphs II and III, by reason of the severance thereof from the land [95] sought to be condemned, and the construction of said railroad and alleged improvement in the manner proposed by plaintiff is the sum of \$500.00.

V.

Answering unto paragraph VII of said Amended Complaint, said defendant denies each and every, all and singular, the allegations therein contained,

commencing with the word "That" in line 32, page 26-c, and continuing to the word "complaint" in line 13, page 27-c of said Amended Complaint.

Wherefore, defendant prays judgment as follows:

1. That said defendant be awarded damages in the sums and in the amounts hereinabove specified for the taking and the damaging of her said land as hereinabove specified.

2. That the plaintiff give to said defendant the damages awarded said defendant within the time prescribed by law, from the time of said award, and that in the event that said payment is not made within said time, this Honorable Court issue a restraining order restraining said plaintiff and its agents, servants and employees, and all other persons acting in aid or assistance of it, from in any manner taking said land or right of way or any part thereof.

3. That said defendant be awarded her costs of suit incurred herein, together with such other and further relief as to the court may seem meet and proper.

**CARTER, BARRETT, FINLEY
& CARLTON**

Attorneys for said defendant

JESSE W. CARTER

Redding, Cal.

Address [96]

[Endorsed]: Filed May 22, 1939. [97]

[Title of District Court and Cause.]

APPLICATION OF CHARLES J. McCONNELL,
ALSO KNOWN AS CHAS. J. McCONNELL,
VICTOR N. MILLER, ALSO KNOWN AS
VIC. MILLER, JOHN J. HUMPHREY,
ALSO KNOWN AS JOHN J. HUMPHREY,
SR., ALSO KNOWN AS J. J. HUMPHREY,
TO OBTAIN A PORTION OF MONEY DE-
POSITED IN COURT IN THE ABOVE EN-
TITLED ACTION PURSUANT TO SEC-
TION 258a, U. S. CODE ANNOTATED (46
STAT. 1421, C. 307, SEC. I)

Come now the above named defendants Charles J. McConnell, also known as Chas. J. McConnell, Victor N. Miller, also known as Vic Miller, and John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., and file this their application to obtain a portion of the money deposited in court by the plaintiff, United States of America, in the above entitled action and in support of said application respectfully allege:

I.

That the plaintiff, United States of America, has deposited in court in the above entitled action the sum of \$2550.00 as compensation for the taking for public use of that certain real property mentioned and described in paragraph VIg of said plaintiff's complaint and designated as parcel No. 7.

II.

That the interest and title of the applicants in and to said parcel No. 7 is as set forth in the answer

of said applicants Victor N. Miller, also known as Vic Miller, and John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., heretofore filed in this Court; that the applicants Victor N. Miller, also known as Vic Miller, John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., and Charles J. McConnell were the owners of and entitled to the possession of said parcel No. 7 at the time and commencement of this action.

III.

That the defendant County of Shasta, a political subdivision of the State of California, has no right and/or title and/or interest and/or claim on said parcel No. 7 for taxes and/or unpaid assessments due against said parcel.

IV.

That none of the defendants designated in plaintiff's complaint by fictitious names have any right, title or interest in [98] and/or to said parcel No. 7.

V.

That the applicants state that true value of said parcel No. 7 is as set forth in the answer of the applicants Victor N. Miller, also known as Vic Miller, and John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., to plaintiff's complaint in the above entitled action which has been heretofore filed in this court.

VI.

That pending the trial and determination of the amount of compensation to be paid to applicants for the taking by the plaintiff of their property hereinabove described for a public use, said applicants desire to obtain a portion of the money heretofore deposited in the court by the plaintiff as hereinabove alleged; that applicants desire said money to be paid forthwith for and on account of the just compensation to be awarded in this action.

VII.

That the amount of said deposit that applicants seek to obtain by this application is the total amount thereof that has been deposited for the taking of said parcel No. 7 as aforesaid and being in the sum of \$2550.00.

VIII.

That applicants state that they are not accepting the amount of money herein prayed for as full compensation for the taking for a public use by plaintiff of said parcel No. 7 but are making this application pursuant to Section 258a, U. S. Code, annotated (46 Stat. 1421, C. 307, Sec. 1) and are requesting that said deposit be paid to them pursuant to said statute and that their acceptance will be pursuant to the terms of said statute, to wit: For and on account of the just compensation to be awarded them in said action and applicants will hereafter ask the court to enter a judgment against the United States of America for the amount of deficiency between said deposit as aforesaid and the amount of

compensation due them for the taking of said parcel No. 7 as aforesaid and as determined by a jury.

Wherefore, applicants pray that the sum of \$2550.00 be paid to them pursuant to the terms of Section 258a, U. S. Code, annotated (46 Stat. 1421, Sec. 1) and pursuant to the above [99] application.

CHARLES J. McCONNELL
VICTOR N. MILLER
JOHN J. HUMPHREY

Applicants

CARTER, BARRETT, FINLEY
& CARLTON

Attorneys for applicants Victor N.
Miller and John J. Humphrey

JESSE W. CARTER

Redding, California

Address

CARR & KENNEDY

Redding, California

Address

Attorneys for Applicant

Charles J. McConnell

Receipt of a copy of the foregoing Application
is hereby acknowledged this 26th day of July, 1939.

ALVIN M. CIBULA

Attorney for the County of Shasta, a
political subdivision of the State of
California

[Endorsed]: Filed Nov. 2, 1939. [100]

[Title of District Court and Cause.]

ORDER

Application having been made therefor by the defendants Charles J. McConnell, also known as Chas. J. McConnell, Victor N. Miller, also known as Vic Miller, John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr., pursuant to Title 40, Section 258a, United States Code Annotated (46 Stat. 1421, C. 307, Sec. 1) to obtain a portion of the money deposited in the above entitled action, and good cause appearing therefor, it is hereby ordered as follows:

1. That this order is made pursuant to Title 40, Section 258a, United States Annotated (46 Stat. 1421, C. 307, Sec. 1) and pursuant to the application of said defendants without prejudice to the right of said applicants to make claim for further compensation pursuant to said statute and said application.

2. That this order relates to the money deposited for that certain property described in the amended complaint in the above entitled action and designated as Parcel No. 7.

3. That the clerk of the above entitled court is hereby ordered to pay the following amounts of money to the following persons:

Defendant Charles J. McConnell.....	\$850.00
Defendant Victor N. Miller.....	850.00
Defendant John J. Humphrey.....	850.00

Dated: November 2, 1939.

MARTIN I. WELSH

Judge of the District Court of the
United States, in and for the North-
ern District of California

[Endorsed]: Filed Nov. 2, 1940. Walter B.
Maling, Clerk. [101]

[Title of District Court and Cause.]

RECEIPT

Receipt is hereby acknowledged of payment by
the Clerk of the Court in the above entitled action
of the following amounts of money to the following
designated persons, to-wit:

Charles J. McConnell.....	\$850.00
Victor N. Miller.....	\$850.00
John J. Humphrey.....	\$850.00

Dated: November 3rd, 1939.

VICTOR N. MILLER

JOHN J. HUMPHREY, SR.

V.N.M.

CHARLES J. McCONNELL

[Endorsed]: Filed Nov. 3, 1940. Walter B.
Maling, Clerk. [102]

[Title of District Court and Cause.]

**INSTRUCTIONS REQUESTED
BY PLAINTIFF [103]**

Instruction No. 1

Gentlemen of the Jury: It is the duty of the Court to explain to you the issues in the cases which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of Law by which you must be guided in your deliberations. It is your duty to accept these instructions as correct, and, so far as the law of the case is concerned, be guided by them.

Under the Fifth Amendment to the Constitution of the United States, it is provided that private property shall not be taken for public use except upon the payment of just compensation. You will note that the thing that the private owner is entitled to when his property is taken for public use is "just compensation."

The Government of the United States possesses what is known in law as the "power of eminent domain". This means that in the exercise of its legitimate powers it has the right to take private property whenever such property is necessary for the public use. In the exercise of that power the Government institutes an action which is commonly referred to as a "condemnation proceeding," whereby it acquires title to the property of the individual upon condition that it pay "just compensation" to the owners for the property of which they are deprived. [104]

Instruction No. 2

In this particular case the Government in the exercise of its powers of eminent domain has taken for public purposes certain tracts of land in Shasta County.

I instruct you that the property of the defendants that is involved in this case has been lawfully and properly taken in eminent domain proceedings by the United States of America for public use, and the right of the Government so to take it is in no way involved in your deliberations. The owners of the property involved are entitled to just compensation for this taking. You are required to find the market value of the property at the time of its taking. The controlling dates in this case are: December 14, 1938, and December 9, 1938, those being the dates when the property in question was taken by the Government. [105]

Instruction No. 3

In this trial we are actually trying six cases because there are actually six separate parcels of land involved. For clarity each of them has been given a number. As to each the following applies:

Parcel No. 1—the so-called Rouge tract.

This tract is being acquired by the government in fee simple, subject to an easement of the Pacific Telephone & Telegraph Company, and reserving to the County of Shasta an easement in and to that portion of the existing county road lying within this parcel. This parcel is divided into three ownerships. Ownership One is the so-called Van Santen owner-

ship. The total Van Santen ownership consisted of 0.0965 acres. Out of that 0.0965 acres the government is acquiring title to .0125 acres, leaving the owner a balance of 0.084 acres. Ownership Two is the so-called Rouge ownership. The total ownership consisted of 0.588 acres. But of that 0.588 acres the government is acquiring title to 0.047 acres. The remainder of this parcel is the so-called Kronschnabel ownership. The government is acquiring all of this ownership containing 3.1105 acres. Just where these ownerships and parcel are located is disclosed by the maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 4—the so-called Johnson tract.

This tract consisted of 17.81 acres. Out of that 17.81 acres the government is acquiring title to 4.91 acres in fee simple, leaving the owner of a balance of 13.0 acres. Just where this 4.81 acres is located in the entire parcel is disclosed by the maps in evidence. The date of taking as to this parcel is December 14, 1938. [106]

Parcel No. 5—the so-called Kronschnabel tract.

This tract consisted of 5.28 acres. Out of that 5.28 acres the government is acquiring title to 1.31 acres in fee simple, leaving the owner a balance of 3.97 acres. Just where this 1.31 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 6—the so-called Agnew tract.

This tract consisted of 0.47 acres. Out of that

0.47 acres the government is acquiring title to 0.02 acres in fee simple, subject to an easement of the Pacific Telephone and Telegraph Company, leaving the owner a balance of 0.45 acres. Just where this 0.02 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 7—the so-called McConnell; Miller and Humphrey tract.

This parcel consisted of 11.05 acres. Out of that 11.05 acres the government is acquiring title to 10.61 acres in fee simple, subject to an easement of the Pacific Telephone and Telegraph Company, leaving the owner a balance of 0.44 acres. Just where this 10.61 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

In case No. 4034-L, which has been consolidated with case No. 4027-L, there is one parcel of land involved.

Parcel One—the so-called Kinsella parcel.

This parcel consisted of 1.968 acres. Out of that 1.968 acres the government is acquiring title to 0.36 acres in fee simple, leaving the owner a balance of 1.608 acres. Just where this 0.36 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December, 1938. [107]

Plaintiff's Instruction No. 4.

So many and varied are the circumstances to be taken into account in determining the market value

of the various kinds of property condemned for public use, that it is impossible to formulate an exact rule to govern its appraisal in all cases. In general, the most profitable use for which the property is adaptable and needed, or likely to be needed in the reasonably near future, is to be considered, not necessarily as the measure of value, but to the extent that the possible demand for such use affects the market value. You should consider all the uses for which the property is reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the reasonably near future. The market value of land taken for public use includes its value for any use to which it may reasonably and practically be put, and all of the uses for which it is reasonably and practically adapted, and not merely the condition in which it is found at the time of the taking, and to which it was applied by the owner at that time. Its reasonable availability for uses which are of such a character as to be reflected in the market value of the property at the time it was taken should be taken into consideration in determining the fair market value of the property, and the just compensation to the owner.

As I have said, the market value of the property taken is the price which considering all the circumstances disclosed by the evidence it would bring if offered for sale in the open market for cash by an informed person who desires to but is not obliged

to sell it, and if purchased by an informed purchaser who is desirous of buying but under no necessity of purchasing. [108] These two elements taken together, namely, a seller willing but not required to sell and a buyer willing but not required to buy, go to make up market value. In determining the value, all of the capabilities of the property, and all the uses to which it may be applied, or to which it is reasonably adapted may be considered, having regard to the existing business or wants of the community or such as may reasonably be expected in the reasonably near future. It is not the value to the owner that you are to consider. It is the full, fair, cash market value of the property as of the date it is taken.

Central Pacific Railroad v. Feldman, 152 Cal. 310;

Sacramento Southern Railway v. Heilbron, 156 Cal. 408;

East Bay Municipal etc. District v. Keefer, 99 Cal. App. 240;

Olson v. U. S., 292 U. S. 246. [109]

Instruction No. 4-A

In arriving at the fair market value of these lands, you are not to fix speculative, boom or fancy values, on the other hand, you are not to fix depression or forced sale values, because the law requires you to determine the fair reasonable market saleable value of the property, if the owner was offer-

ing to sell on usual terms and under ordinary circumstances and the purchaser desired to buy.

United States vs. Inlots, 26 Fed. Cas. 490,
494 affd. in Kohl v. U. S., 91 U. S. 367, 23
L. Ed. 449;

Kansas City, W. & N. W. R. R. Co., vs.
Fisher, 49 Kan. 17, 18, 13 Pac. 111;
Suburban Land Co., Inc., vs. Arlington, 219
Mass. 539, 541, 107 N. R. 432. [110]

Instruction No. 6

The compensation which must be paid to the owners of the property here involved and which has been taken by the government is the fair market value of that property at the time it was so taken. The taking of the property occurred on the dates I have already given you, on which dates the government filed a declaration of taking which resulted in the automatic vesting of the title to the property described in said declaration, in the United States Government.

In considering the amount of compensation to be awarded to the defendants you must take into consideration two elements—first, the reasonable market value of the property taken as of the dates referred to; secondly, any damage sustained by the defendants by reason of the severance of the property so taken from the other property owned on that date by the defendants respectively.

40 U. S. C. Section 258a, and

Brett v. U. S., 86 F. (2d) 305. [111]

Instruction No. 7

Evidence has been introduced in this case for the purpose of showing that the property taken is valuable for certain purposes, and that the property has certain advantages and could be put to certain advantageous uses by reason of its location, and by reason of its adaptability to certain specific purposes. Such evidence should be taken into consideration by you in determining the market value of the property taken, and the damages, if any, to the property not taken. And it is proper for you to consider the evidence that has been introduced as to the uses to which the property can be put, for the purposes of assisting you in determining the question as to what was the market value of the property taken upon that date.

Given in substance in:

City of Oakland v. Pacific Coast, et al., 171
Cal. 392. [112]

Instruction No. 10

In determining the value of the lands which in this case have been taken for public use, the same consideration are to be weighed by you as in the case of a sale of property between private persons. The inquiry in the case must be: What is the property reasonably worth in the market, viewed not merely with reference to the use to which it was put at the time this action was begun, but with reference to any and all uses to which it was reasonably and practically adapted within the reasonably near future.

Central Pacific Railroad v. Feldman, 152
Cal. 310;

Sacramento Southern Ry. v. Heilbron, 156
Cal. 408;

East Bay Municipal etc. District v. Keefer,
99 Cal. App. 240;

Temescal Co. v. Marvin, 121 Cal. App. 512;

Olson v. U. S., 292 U. S. 146. [113]

Instruction No. 11

The question of the amount of compensation to be awarded to the defendants is not a question of what the property taken would have been worth to the defendants respectively if they had decided to retain the property taken, because it may possess a greater value to them than it had on the open market. The question for you to consider is this— if the defendants had desired to sell the property taken from them, respectively, by the government, what could they have obtained for it upon the market, being allowed a reasonable time in which to find a purchaser who was buying with a knowledge of all the uses and purposes to which the property was adapted?

Given in substance in:

City of Oakland v. Pacific Coast Lumber &
Mill Co., 171 Cal. 392. [114]

Instruction No. 12

With reference to the subject of severance damages I instruct you that such damages, if you find that they were suffered by the defendants by the

taking of their property, must be based upon some disturbance of a property right which undoubtedly naturally tends to and actually does decrease the market value of their property.

The fear of a remote or contingent injury which may possibly occur but the happening of which is altogether speculative and uncertain is not regarded by the law as an element entering into the damages which may be allowed to an owner of property. The damage sustained in order to be allowed by you in your verdict must be direct and proximate and not such damage as is merely possible or may be conceived by the imagination.

Gas & Electric Co. v. Miller & Lux, Inc., 118 Cal. App. 140, 144. (Citing numerous cases). [115]

Instruction No. 13

The Government may not be required to pay any increase in the value of the property which it has caused by reason of its contemplated taking of the property by eminent domain proceedings. Any rise in value before the taking should be allowed to the property owners but not any rise caused by the expectation that the Government intended to condemn the property.

As you have already heard, this property is being taken for the so-called Central Valley Project. If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937, such increases or enhancement in

value is not to be considered by you. The value you are to fix and award as compensation is the value this land would have had had this project not been announced, planned or constructed on August 26, 1937. It may be that because of this project the use for which the property is suited may have changed. You should consider it only for the use to which it was suited or adapted before that use was changed by the project. The Government must not be required to pay for something it has itself created.

New York v. Sage, 239 U. S. 57, 61;

U. S. v. Chandler-Dunbar Co., 229 U. S. 53 at 76;

San Diego Land, etc. v. Neale, 78 Cal. 63;

Temescal Co. v. Marvin, 121 Cal. App. 512;

Shoemaker v. U. S., 147 U. S. 282, 305;

Kerr v. South Park Comrs., 117 U. S. 379, 386, 387. [116]

Instruction No. 13-A

You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which may have occurred from and after that date which you may find was attributable to the announcement of, plan for or construction of this project.

Shoemaker v. U. S., 147 U. S. 282 at pp. 304, 305; (Supreme Court of U. S. approving similar instruction);

Kerr v. South Park Comrs., 117 U. S. 379,
pp. 386, 387;

Act Aug. 26, 1937, 50 Stat. 844, 850. [117]

Instruction No. 14

By order of the court you went upon the property involved in this action and viewed that property so that you might have a more intelligent understanding of the evidence. You should use the result of your observation of that property, together with all the other evidence in the case, in arriving at your verdict.

Given in substance in:

City of Oakland v. Pacific Coast Lumber &
Mill Co., 171 Cal. 392. [118]

Instruction No. 15

Where witnesses qualify as experts in a particular field of knowledge or learning, and are called to the witness stand and allowed to express opinions, those opinions are for the aid and the assistance of the jury and not for the purpose of invading its functions. The responsibility of decision rests upon the jury. It is your duty to evaluate and appraise the testimony of the witnesses who express opinions, precisely as you are called upon to evaluate the testimony of witnesses who testify to facts. It is for you, in the light of all the circumstances as disclosed during the progress of this case, to place that weight and give that credit to the testimony of each witness which you conscientiously believe, in

the exercise of sound judgment and good sense, it is entitled to have at your hands, and no more. [119]

Instruction No. 16

Testimony has been given on the trial of this action by persons who are commonly referred to as expert witnesses. An expert witness is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation and practice. Expert testimony is the opinion of such a witness, based upon the facts in the case, as shown by the evidence. Before you can give any weight to expert testimony you must first find from the evidence that the facts upon which it is based are true. Expert witnesses were called to testify in this case because they indicated, by a statement of their qualifications, that they had given the subjects in regard to which they testified, particular study. It therefore becomes important for you to consider the evidence, and to determine whether the facts referred to by those witnesses as the reason for their opinions of the value of the property involved, actually exist. If the facts upon which any of those expert witnesses base their opinions are not true, then the opinion of such expert has its value impaired to the extent that the facts assumed are found by you not to be true.

The opinions of the real estate experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act

upon such opinion to the exclusion of other testimony. Taking into consideration those opinions, and giving them just and proper weight, you are to determine for yourselves from the whole evidence what was the reasonable market value of the property taken by the government on the dates when the property in question was taken by the government.

Given in substance in:

City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392. [120]

Instruction No. 17

In arriving at a verdict it is your duty not only to weigh with care and scrutiny all the testimony which has been placed before you, but also to attempt, so far as possible, to reconcile the conflicting testimony upon questions of value and damages. If you shall find that there is a wide diversity in the testimony of different witnesses as to the value of defendant's property, and as to the damages occasioned to the defendants by reason of its taking, in attempting to reconcile the conflicting opinions of the different witnesses you should carefully consider the different theories upon which such opinions are based.

Determine on the one hand if witnesses have unduly diminished values, or the elements of value or injury which enter into their estimates, or whether they may have omitted altogether elements of value or of injury which in fact exist, and should be considered.

Determine on the other hand if witnesses have exaggerated the values which they have placed on the land, or any part of it; or have exaggerated the elements of injury which have entered into their estimates of depreciated value, or whether they have included estimates of injury which do not exist, or which should not have been considered.

Determine if the theory upon which the witnesses on either side proceeded in reaching their conclusions were sound or fallacious. Apply these and similar tests in order that you may be able, if possible, to reconcile the conflicting testimony and to give it all due weight, and to arrive at a just verdict.

Given in substance in:

City of Oakland v. Pacific Coast Lumber & Mill, S. 171 Cal. 392. [121]

Instruction No. 18

Although the value of the land taken by the government must be estimated on the basis of its value for all purposes including its value as a potential subdivision (if you find that it has a value as such potential subdivision which was not due to the project itself) nevertheless you may not take into consideration the price that its owners might have been able to obtain for the land after such subdivision had actually taken place.

City of Los Angeles v. Hughes, 202 Cal. 731, 734-5;

U. S. v. Taaffe, 78 F. 524. [122]

Instruction No. 20

Not only does the burden rest on the defendants to prove the damages sustained by them by reason of the property that is taken by the Government but the burden also rests on them to prove the damages, if any, to the residue of the property belonging to them which is not taken.

U. S. vs. Crary, 2 Fed. Supp. 870, 876. [123]

Instruction No. 21

What is meant in law by what is sometimes called "consequential damages," or sometimes called "severance damage", is this: that where a part of a larger tract of land is appropriated for public use, it is competent for the jury to take into consideration in assessing compensation to the owners the damage to the remainder of his contiguous tract which has not been taken caused by severing from it that which is taken. We call it severance damage because it is due to the severing from the larger tract of a part of it. We call it consequential damage because it is the damage which results in consequence of that severance, and where a smaller from a larger area is taken the damage, if any, resulting to the part not taken is severance or consequential damage. Now, in arriving at the severance or consequential damage to the property which the Government has not taken, I instruct you that this is the measure by which to ascertain that amount: It is the difference between the fair, cash market value of the property not taken before the

severance took place, and its fair, cash market value after the severance takes place—taking into consideration all the facts and circumstances and conditions as disclosed by the evidence. If the remainder of the property, or the property not taken is left in a less advantageous condition than it was before, then it is your duty to determine to what extent its value has been impaired in consequence of the severance. You must value it for what it would be worth if the Government had not taken a foot of his property, and then value it for what it would be fairly worth in the market in the light of the changes which the severance has brought about, and the difference between these two amounts is the consequential or severance damage to be awarded for the land not taken. [124]

We must treat the defendants and the Government with absolute fairness. The defendants ought to receive every dollar that they are entitled to receive, and on the other hand they ought not to receive a dollar more than they are entitled to. They should not be made any richer and they should not be made any poorer by reason of this proceeding. On the other hand, the Government ought to pay every dollar it owes them, but it ought not to pay a dollar more than it owes them. The situation is exactly the same as if the suit was between two individuals. [125]

Instruction No. 22

The necessities of the Government in acquiring the property must not be taken into consideration.

nor must any unwillingness to sell the property by the owner be taken into consideration by you in your deliberations.

In determining the fair, cash market value of the property sought to be condemned, you will not permit yourselves to be in any way influenced by the character of the plaintiff as the Government of the United States. You will, in determining the amounts to be paid by the Government to the defendants as compensation for the taking thereof, proceed in precisely the same spirit of fairness that you would exercise if you were sitting as finders of fact to determine the value of such property between owners who were willing to sell and a private purchaser who was willing to buy, where such parties had agreed that such property should be sold at a fair, cash market value, and had submitted to you as finders of fact the question of determining what that fair, cash market value was.

You will understand that in ascertaining the fair, cash market value of property as of a particular time, the law has no accurate mathematical standard by which that amount can be ascertained. Much must be left to the sound judgment and good common sense of a conscientious jury. In your deliberations there is no room for sympathy or sentiment or prejudice or passion. You must decide the case without regard to personalities and be guided, so far as the law is concerned, solely by the instructions of the Court, and so far as the facts of the case are concerned, solely by the testimony of the witnesses.

Instruction No. 23

I have heretofore instructed you in regard to certain of the principles of law pertaining to the amount of compensation to be awarded to the defendants in this action, for the land taken. You should bear in mind that such compensation is the reasonable market value of the land at the time it was taken by the Government and not any future value that the land may now have, or may hereafter have, since no human tribunal is able to determine judicially what value land may have at some future time.

U. S. v. First National Bank, 250 Fed. 299, 301;

Brett vs. U. S., 86 Fed. (2d), 305, 307; (CCA-9), citing *Olson vs. U. S.* 292 U. S. (cert. den. 301 U. S. 682). [127]

Instruction No. 24

In considering the evidence in this case you may take into consideration facts that are generally known in the vicinity of the land. Thus you may consider the generally known facts in regard to the history of locality. You may take into consideration the general topography and the weather conditions in the region. These matters being matters of common knowledge, it is not necessary that evidence be introduced in regard to them.

Brown vs. Pieper, 91 U. S. 37;

5 *Wigmore on Evidence*, 2nd edition. Section 2570;

Varcoe vs. Lee, 180 Cal. 338. [128]

Respectfully submitted,

FRANK J. HENNESSY

United States Attorney

ROBERT B. McMILLAN,

Assistant United States
Attorney

C. U. LANDRUM,

Special Assistant United
States Attorney.

Attorneys for Plaintiff

[129]

[Title of District Court and Cause.]

**ADDITIONAL INSTRUCTIONS REQUESTED
BY PLAINTIFF [130]**

Plaintiff's Instruction No. A

In determining the damages, if any, in this case, to be awarded to the defendants, you must consider the damage to the land and the improvements pertaining thereto, only and are not to take into consideration any damage to or loss of any business conducted on said land, if you find that there is any damage or loss of business.

Oakland vs. Pacific Coast Lbr. Co., 171 Cal.
392, 153 Pac. 708

Mitchell vs. U. S., 267 U. S. 341

Morris vs. San Francisco, 59 Cal. App. 364

San Francisco vs. Kierman, 98 Cal. 614, 33
Pac. 720

San Diego Land Co. vs. Neal, 88 Cal. 50
Nichols on Eminent Domain, Section 190

Given:

Refused:

Judge. [131]

Plaintiff's Instruction No. B

You are further instructed that whatever purpose the defendants had in connection with the future use of the land does not determine its market value.

A use existing or contemplated on property is distinct from the market value of the land itself and is not the conclusive basis for fixing such market value and is not to be considered as determining the value of the land. Value in use may be considered as market value but is not to be considered by you as determinative of the market value of the property.

Heilbron vs. Sacramento R. R. Co., 156 Cal.
408

Eachus vs. Los Angeles R. R. Co., 103 Cal.
614

Santa Ana vs. Harlin, 99 Cal. 538

Kishler vs. S. P. R. R. Co., 134 Cal. 685

Oakland vs. Pac. Coast Lbr. Co., 171 Cal. 392

Given:

Refused:

Judge. [132]

Plaintiff's Instruction No. C

You are instructed that mere infringement of the owners' personal use of property or merely rendering the property less desirable for certain purposes, or even causing personal annoyance or discomfort does not constitute a damage for which compensation should be made, unless the property thereby suffers some diminution in substance, or is thereby depreciated in its market value.

Eachus vs. Los Angeles, etc., Co., 103 Cal. 614

Kishlar vs. S. P. Co., 134 Cal. 636

Given:

Refused:

.....
Judge. [133]

Plaintiff's Instruction No. D

An abutting property owner on a public highway is not entitled as against the public to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off or materially interfered with; and if he has free and convenient access to his property and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint and the United States is therefore not liable for any damages in relation thereto.

Genozzi vs. County of Marin, 88 Cal. App.

545

Given:

Refused:

.....
Judge. [134]

Plaintiff's Instruction No. E

The just compensation assured by the Fifth Amendment to an owner, part of whose land is taken for public use, does not include compensation for diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Campbell vs. United States, 266 U. S. 368

Given:

Refused:

.....
Judge [135]

Defendant's Instruction No. 1

You are instructed that it is your duty to award to each of the defendants, respectively, the full market value of their respective properties sought to be condemned.

Given:

Refused:

.....
Judge [136]

Defendant's Instruction No. 2

Market value is the amount the strip would sell for if put upon the open market and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and

make the sale and having in mind all of the purposes to which it is naturally adapted.

Sacramento, etc., R. R. Co. vs. Heilborn, 156 Cal. 412.

Santa Ana vs. Harlin, 99 Cal. 538

Given:

Refused:

Judge. [137]

Defendant's Instruction No. 3

In arriving at your conclusion on the market value of the lands in question, you should consider what the property taken was worth on the market at and immediately prior to the time of taking, not merely with reference to the uses to which it was at that time applied, but with reference to the uses to which it was reasonably adapted. That is to say, what it was worth considering its availability for all valuable uses, as shown by the evidence.

Given:

Refused:

Judge [138]

Defendant's Instruction No. 4

In determining the value of the property sought to be condemned, the rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value, in the minds of purchasers gen-

erally, which necessarily makes it proper to consider for what purpose it is most valuable or adapted. Any existing facts which enter into the value of the land in the public and general estimation and tending to influence the minds of sellers and buyers, may be considered.

Spring Valley Water Co. vs. Drinkhouse, 99 Cal. 531

Given:

Refused:

Judge [139]

Defendant's Instruction No. 5

You are instructed that the damages you are to assess as the value of the property sought to be condemned should be the fair market value of the land in view of all the purposes to which it is naturally adapted, but market value is the measure of damages to be assessed and not its value in use to the defendants or to the plaintiff. The question for you to determine is what the property was worth in the market on December 14th, 1938, in the one case, and on December 9, 1938 in the Kinsella case.

Santa Ana vs. Harlin, 99 Cal. 538

Sacramento Ry. vs. Heilborn, 156 Cal. 408

Given:

Refused:

Judge. [140]

Defendant's Instruction No. 6

The location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. In ascertaining the market value, you may consider the purpose for which the land is adapted, and the price for cash it would bring on the market for any purpose, allowing a reasonable time in which to find a purchaser.

Sacramento, etc. R. R. Co. vs. Heiborn, 156
Cal. 413

Given:

Refused:

.....
Judge. [141]

Defendant's Instruction No. 7

In determining the value of the property sought to be condemned, the rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value, in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable or adapted. Any existing facts which enter into the value of the land in the public and general estimation and tending to influence the minds of sellers and buyers may be considered.

Given:

Refused:

.....
District Judge. [142]

Defendants' Instruction No. 8

Market value is the amount the property would sell for if put upon the open market and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale, and having in mind all of the purposes to which it is naturally adapted.

Given:

Refused:

District Judge [143]

Defendants' Instruction No. 9

The chance that land will increase in value as population increases, and new facilities for transportation and new markets are created, is an element of value quite generally taken into consideration in the purchase of land, in estimating its present market value.

This chance for gain is the property of the land owner, and you are, therefore, instructed that this constitutes an element to be considered in determining the market value of land.

Refused:

Judge [144]

Defendants' Instruction No. 10

In determining the value of land appropriated for public purposes, the same consideration are to

be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is plainly adapted; that is, to say, what is it worth from its availability for all valuable uses. Property is not to be deemed to be worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life; its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to existing business or wants in the community, or which as may be reasonably expected in the immediate future.

Mississippi, etc. Boom Co. v. Patterson, 99
U. S. 403; 25 L. Ed. 206.

Given:

Refused:

Defendants' Instruction No. 12

In determining the actual value of the land at the date of taking, you are not to take as the measure of that value what the owner could realize at forced sale, but you must take the price he could obtain for his property after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; and in making that estimate, you must consider the uses for which the property is suitable, as explained in these instructions, having regard to the existing business or wants of the community, or such as may reasonably be expected in the future.

Given:

Refused:

Judge [146]

Defendants' Instruction No. 13

You are instructed that in determining the damage, if any, to the lands not taken, you are to take into consideration all the facts and circumstances established by the evidence in this case, bearing upon the extent of such damages.

Given:

Refused:

Judge [147]

Defendants' Instruction No. 14

You are instructed that the defendants, respectively are entitled to recover not only for the dam-

ages to the lands not taken by reasons of its severance from the portion sought to be condemned, but are also entitled to damages if any, to the portion not taken by reason of the construction of the improvements in any manner consistent with the use proposed by the plaintiff.

Determination of such damages is exclusively with the jury.

Given:

Refused:

Judge [148]

Defendants' Instruction No. 15

If you find that by taking the right of way for the use described in the complaint, damages will result to the property that is not taken, then it is your duty to consider the shape and size of the parcels which remain, the increased difficulty caused by the taking if any, in getting to or upon these parcels, or in going to or from one portion or the other thereof, and any inconvenience and disfigurement of the property remaining, if any, which may be caused by the taking and any interference with future development of the land for any purposes for which it may be adapted, or to which it may be applied, and insofar as you may find that any of such conditions depreciate the market value of the property and are the result of taking the right

of way which the plaintiff seeks to condemn, you will award the defendants damages therefor.

Given:

Refused:

District Judge [149]

Defendants' Instruction No. 16

You are instructed that in determining the damages, if any, to the property not taken, it is your duty to consider the shape and size of the parcel or parcels which remain, the difficulty of access and of communication between the different parts, inconvenience and disfigurement caused by the taking, insofar as you may find that any of such conditions may result from the condemnation of the property.

Refused:

District Judge [150]

Defendants' Instruction No. 17

In assessing the compensation to be made to the defendants, respectively, the jury must assess the value of the land taken at what they believe from the evidence it is worth, irrespective of any benefits which may or may not accrue to the remainder of the tract, if any, in consequence of the appropriation of the land taken, without deducting anything whatever on account of any benefits which may or may not accrue to such tract.

In other words, the defendants, respectively, are entitled to recover the full market value of the land taken.

Given:

Refused:

Judge [151]

Defendants' Instruction No. 18

You are instructed that, after you have determined the market value of the strip of land sought to be condemned for the construction of improvements in the manner proposed by plaintiff, you must then ascertain and assess the amount of damages, if any, which accrue to the portion not sought to be condemned by the plaintiff. This damage, if any, will be determined by ascertaining the market value of these portions of said lands not taken as it was on the respective dates of taking in these cases, and by deducting therefrom the market value of said property after severance and the construction of improvements in the manner proposed by plaintiff, the difference between these values, if there shall be any, will be the amount of damage done to the part of said land not taken by the severance and construction of the improvements as proposed by plaintiff.

Colusa and Hamilton R. R. Co. vs. Leonard,
176 Cal. 126;

Sacramento, etc. R. R. Co. vs. Heilborn, 156
Cal. 414.

Given:

Refused:

Judge [152]

Defendants' Instruction No. 19

In this case, the damages are assessed and compensation made once for all, and this proceeding will forever bar the defendants, and all persons holding under them from any future claim for damages resulting from the taking of the work. The compensation is, therefore, to be determined according to the full measure of the rights acquired by the plaintiff, and not necessarily according to the rule in which it proposes to exercise those rights in the first instance.

Given:

Refused:

Judge [153]

Defendants' Instruction No. 20

You are instructed that by the judgment in this action the plaintiff will acquire the property sought to be condemned for all the uses and purposes alleged in the complaint in any *was* it pleases, which is not negligent or unlawful and which does not violate the rights of adjacent owners, and it will have the right to change the mode of construction

at pleasure for the purpose of enjoying the right or rights acquired by such judgment. As the damages must be assessed one for all in this proceedings, they must be assessed on the basis of the most injurious mode of construction and use that is reasonably possible for the purpose for which the property is condemned.

Lewis on Eminent Domain, Dec. 713.

Refused:

Judge [154]

Defendants' Instruction No. 21

In this case, the damages are assessed and compensation made once for all, and this proceeding will forever bar the defendants and all persons holding under them from any future claim for damages resulting from the taking of the right of way through their properties. The compensation is, therefore, to be determined according to the full measure of the rights acquired by the plaintiff, and not necessarily according to the mode in which it proposes to exercise those rights in the first instance.

Given:

Refused:

District Judge [155]

Defendants' Instruction No. 22

You are instructed that the damages are to be assessed upon the full measure of the rights ac-

quired by the plaintiff in this action, and not alone upon the manner in which it proposes to exercise such rights in the first instance.

Refused:

Judge [156]

Defendants' Instruction No. 25

You are instructed that in determining the damages, if any, which will accrue to the land not taken, by reason of its severance from the strip of land taken, you should take into consideration every element of annoyance, disadvantage or inconvenience, if any, resulting from the appropriation of the land which would involve the reasonable judgment of an intending purchaser as to the market value of the property involved.

District Judge

65 Fed. (2d) 297 [157]

Defendants' Instruction No.

The owner of land abutting on a street or highway has a private right in such street or highway distinct from that of the public for the purpose of access to and egress from his land, which cannot be taken nor materially interfered with without just compensation and this is so although another owns the fee in the highway.

20 Corpus Juris; 656;

Schaufele v. Doyle, 86 Cal. 107, 24 P. 834;

Cushing-Wetmore Co. v. Gray, 152 Cal. 118,
125 Am. St. Rep. 47, 92 P. 70;

McCandless v. City of Los Angeles, 214 Cal.
67, 4 P. (2d) 139.

Given:

Refused:

Judge

[Endorsed]: Filed Nov. 8, 1940. [158]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above entitled action, Find
As Follows:

1. Parcel 1.

- (a) Value of land, taken, portion belonging to
Albert Rouge, (.047 acres) \$50.00
- (b) Damage, if any, to portion of land of Albert
Rouge not taken by reason of its severance
from parcel last above described and construc-
tion and maintenance of railroad in the man-
ner proposed by Plaintiff \$ Nil
- (c) Value of land taken, portion belonging to Le-
land R. Kronschnabel and Nell R. Kronschn-
abel, (3.11 acres) \$165.00
- (d) Damage, if any, to portion of land of Leland
R. Kronschnabel and Nell R. Kronschnabel,
not taken, by reason of its severance from
parcel last above described and construction
and maintenance of railroad in the manner
proposed by Plaintiff \$ 75.00

- (e) Value of land taken known as the Florence Van Santen land, consisting of .0125 acres \$ 10.00
- (f) Damage, if any, to portion of land known as the Florence Van Santen land, not taken by reason of its severance from parcel last above described and construction and maintenance of railroad in the manner proposed by plaintiff \$ Nil

2. Parcel 4.

- (a) Value of land taken belonging to Defendants Elmer Johnson and Hilma Johnson (4.81 acres) \$125.00
 - (b) Damage, if any, to portion of land of defendants Elmer Johnson and Hilma Johnson, not taken, by reason of its severance from parcel taken last described and construction and maintenance of railroad in the manner proposed by Plaintiff \$120.00
- [161]

3. Parcel 5.

- (a) Value of land taken belonging to Defendants Leland R. Kronschnabel and Nell R. Kronschnabel (1.31 acres) \$650.00
- (b) Damage, if any, to portion of land of Leland R. Kronschnabel and Nell R. Kronschnabel, not taken, by reason of its severance from parcel last above described, and construction and maintenance of railroad in the manner proposed by Plaintiff \$ 20.00

4. Parcel 6.

- (a) Value of land taken belonging to Defendant David Wilson Agnew (0.02 acres) \$ 15.00
- (b) Damage, if any, to portion of land of David Wilson Agnew, not taken, by reason of its severance from parcel last above described and construction and maintenance of railroad in the manner proposed by Plaintiff \$ Nil

5. Parcel 7.

- (a) Value of land taken belonging to Defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey (10.61) acres \$500.00
- (b) Damage, if any, to portion of land of Defendants Charles J. McConnell, Victor N. Miller, and John J. Humphrey, not taken by reason of its severance from parcel above described, and construction and maintenance of railroad in the manner proposed by Plaintiff \$100.00

Dated: February 10, 1940.

E. M. JOHNSON

Foreman.

[Endorsed]: Filed Feb. 10, 1940. Walter B. Maling, Clerk. [162]

In the District Court of the United States, in and for the Northern District of California, Northern Division.

No. 4027-L.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CERTAIN PARCELS OF LAND. [163]

JUDGMENT.

The above-entitled action, as affecting the lands hereinafter described as Parcels No. 1, No. 4, No. 5, No. 6, and No. 7, duly came on for trial before the above-entitled Court, Honorable Martin I. Welsh,

United States District Judge, presiding, on Monday, January 29, 1940, plaintiff being represented by its attorneys, Frank J. Hennessy, Esq., United States Attorney, C. U. Landrum, Esq., Special Assistant United States Attorney, R. B. McMillan, Esq., Assistant United States Attorney, and G. B. Hjelm, Assistant United States Attorney; defendants Albert Rouge, Elmer Johnson and Hilma Johnson, being represented by their attorney R. P. Stimmel, Esq.; defendants Leland R. Kronschnabel, Nell R. Kronschnabel, Florence Van Santen, Victor N. Miller and John J. Humphrey being represented by their attorney J. Oscar Goldstein, Esq.; and defendants David Wilson Agnew and Charles J. McConnell being represented by their attorneys Messrs. Carr & Kennedy;

And it appearing to the Court from the records and files of the above-entitled action that under date of December 14, 1938, a declaration of taking under the provisions of Title 40, Section 258a, United States Code, signed by the authority empowered by law to acquire the lands therein described, to wit, the Secretary of the United States Department of the Interior, was duly filed in this Court on December 14, 1938, as provided by law, and that with the filing of said declaration of taking there was deposited in this Court, to the use of the persons entitled thereto, the sum of \$10,360.00 as the estimated just compensation for the lands taken and described in the amended complaint on file herein and in the said declaration of taking; that

this Court on the said 14th day of December, 1938, duly made and entered its judgment on said declaration of taking, under the terms [165] of which this Court found and decreed the authority under which and the public use for which said lands were condemned and taken, and described the lands sufficiently for the identification thereof, and found and decreed the estate and interest in said lands condemned and taken for the public use therein described, and found and decreed that the lands condemned and taken were situate in the County of Shasta, State of California, and were as shown on the plan attached to the said declaration of taking filed in this action, and found and decreed that the sum of \$10,360.00 had been estimated by the plaintiff to be just compensation for the lands condemned and taken and therein described, being designated Parcels No. 1, No. 2, No. 3, No. 4, No. 5, No. 6, and No. 7, and that said sum had been deposited in the Court to the use of the persons entitled thereto; and thereupon title in fee simple absolute in and to said lands vested in the United States of America and the same were deemed to be condemned and taken for the use of the United States of America, and the right to just compensation for the same vested in the persons entitled thereto;

And it appearing to the Court from the records and files of the above-entitled action, and the evidence introduced at the trial thereof, that the said land described in the amended complaint, the

declaration of taking, and the judgment on the declaration of taking, as Parcel No. 1, is as follows:

Here follows description of land embraced in Parcel One. [166]

that prior to the condemnation and taking thereof by the United States of America said land was the property of and owned by defendants Albert Rouge, Leland R. Kronschnabel, Nell R. Kronschnabel and Florence Van Santen; and that the sum estimated and deposited in Court as just compensation [167] for the taking of said land, that is, said Parcel No. 1, was the sum of \$300.00;

And it appearing to the Court from the records and files of the above-entitled action, and the evidence introduced at the trial thereof, that the said land described in the amended complaint, the declaration of taking, and the judgment on the declaration of taking, as Parcel No. 4, is as follows:

Here follows description of land embraced in Parcel Four. [168]

that prior to the condemnation and taking thereof by the United States of America said land was the property of and owned by defendants Elmer Johnson and Hilma Johnson; and that the sum estimated and deposited in Court as just compensation for the taking of said land, that is, said Parcel No. 4, was the sum of \$510.00; [169]

And it appearing to the Court from the records and files of the above-entitled action, and the evidence introduced at the trial thereof, that the said

land described in the amended complaint, the declaration of taking, and the judgment on the declaration of taking, as Parcel No. 6, is as follows:

Here follows description of land embraced in Parcel Six. [170]

that prior to the condemnation and taking thereof by the United States of America said land was the property of and owned by defendant David Wilson Agnew; and that the sum estimated and deposited in Court as just compensation for the taking of said land, that is, said Parcel No. 6, was the sum of \$50.00;

And it appearing to the Court from the records and files of the above-entitled action, and the evidence introduced at the trial thereof, that the said land described in the amended complaint, the declaration of taking, and the judgment on the declaration of taking, as Parcel No. 7, is as follows:

Here follows description of land embraced in Parcel Seven. [171]

that prior to the condemnation and taking thereof by the United States of America said land was the property of and owned by defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey; and that the sum estimated and deposited in Court as just compensation for the taking of said land, that is, said Parcel No. 7, was the sum of \$2,550.00;

And it appearing to the Court from the records and files of this action that upon the filing of said

declaration of taking there was deposited in this Court, to the use of the persons entitled thereto, the sum of \$5,700.00 as the amount of the estimated compensation for the taking of Parcel No. 2, described in the amended complaint, declaration of taking, and judgment on the declaration of taking filed herein; that prior to the trial of this action defendant Chester L. Barger, as the owner and party in interest, and Shasta County Title Company, as trustee, and J. V. Stanton and Charles J. McConnell, as beneficiaries, as parties in interest by virtue of that certain trust deed dated June 24, 1938, and recorded July 8, 1938, in Volume 125 of Official Records, at page 403, Shasta County records, made application, pursuant to the provisions of Title 40, Section 258a, United States Code, to this Court for its order that said sum of \$5,700.00 deposited in the Court as aforesaid be paid forthwith for and as just compensation in full to be awarded in this proceeding, together with all damages incident to the taking of said Parcel No. 2; [173] that pursuant to said application the Court made its order on July 12, 1939 that the sum of \$4,655.02 be paid forthwith to said defendant Chester L. Barger, found by the Court to be the owner of said land and one of the parties in interest and entitled to receive said sum of \$4,655.02 as aforesaid, that the sum of \$1,044.98 be paid forthwith to said defendants Shasta County Title Company, as trustee, and J. V. Stanton and Charles J. McConnell, as beneficiaries, as parties in interest

and entitled to receive said sum of \$1,044.98, and on July 12, 1939, the Clerk of this Court duly paid out said sum of \$4,655.02 to said defendant Chester L. Barger and said sum of \$1,044.98 to said defendants Shasta County Title Company, as trustee, and J. V. Stanton and Charles J. McConnell, as beneficiaries:

And it appearing to the Court from the records and files of this action that upon the filing of said declaration of taking there was deposited in this Court, to the use of the persons entitled thereto, the sum of \$1,110.00 as the amount of the estimated compensation for the taking of Parcel No. 3, described in the amended complaint, declaration of taking and judgment on the declaration of taking filed herein; that prior to the trial of this action defendants Charles J. McConnell, J. V. Stanton, W. L. Hill, Victor N. Miller and John J. Humphrey, as the owners and parties in interest, made application, pursuant to the provisions of Title 40, Section 258a, United States Code, to this Court for its order that said sum of \$1,110.00 deposited in the Court as aforesaid be paid forthwith for and as just compensation in full to be awarded in this proceeding, together with all damages incident to the taking of said Parcel No. 3; that pursuant to said application the Court made its order on September 11, 1939, that said sum [174] of \$1,110.00 be paid forthwith for and as just compensation in full to be awarded, together with all damages incident to the taking of said land, to said Charles J. McCon-

nell, J. V. Stanton, W. L. Hill, Victor N. Miller and John J. Humphrey, found by the Court to be the owners of said land and the parties in interest and entitled to receive said sum of \$1,110.00 as aforesaid; and on September 11, 1939, the Clerk of this Court duly paid out said sum to said Charles J. McConnell, J. V. Stanton, W. L. Hill, Victor N. Miller and John J. Humphrey;

And it appearing to the Court from the records and files in the above-entitled action that prior to January 29, 1940, defendants, Alice Ware Stanton, Maude E. Hill, Myrtle Barger, appearing as Mary Black Five, Barbara Patricia Miller, appearing as Mary Black One, Anna Elizabeth Humphrey, appearing as Mary Black Two, State of California, appearing as John Doe One, The County of Shasta, filed disclamers in the above-entitled action; that said action was duly dismissed as to defendant Pacific Telephone and Telegraph Company, a corporation, and that on January 29, 1940, the answer filed herein by defendant Pacific Gas & Electric Company, a corporation, was, with the consent of said defendant, ordered stricken from the files in this action.

A jury was on January 29, 1940, duly impaneled and sworn for the purpose of ascertaining the value of the aforesaid Parcels No. 1, No. 4, No. 5, No. 6, and No. 7, and the just compensation to be paid to the owners thereof, [175] together with severance damages, if any, and thereupon on motion of plaintiff, and with the consent of the above-named at-

torneys for defendants appearing at the trial, and upon order of the Court, the jury viewed the real property and premises in question; and evidence both oral and documentary having been introduced by the respective parties, and the Court having instructed the jury on the law applicable, the jury thereafter retired and on February 10, 1940 returned its verdict in words and figures as follows:

We, the Jury in the above entitled action, Find As Follows:

Here follows verdict as rendered. [176]

Now, Therefore, by virtue of the law and by reason of the premises and the said verdict;

It Is Adjudged and Decreed, that the value of the land taken, belonging to said defendant Albert Rouge and being a portion of the hereinbefore described Parcel No. 1, and the just compensation to be paid to said defendant Albert Rouge, as the owner thereof, is the sum of Fifty and No/100 (\$50.00) Dollars, that no damages have accrued or will accrue to the land not condemned of which said Parcel No. 1 was a part, by reason of its severance from Parcel No. 1; and that said defendant Albert Rouge have and he hereby is given judgment against the United States of America for said sum of \$50.00, without interest; that the Clerk of this Court forthwith pay out of the registry of this Court to said defendant Albert Rouge the sum of \$50.00, and upon payment thereof said judgment against United States of America in favor of said Albert Rouge shall be considered fully paid, discharged and satisfied;

It Is Further Adjudged and Decreed, that the value of the land taken, belonging to said defendants Leland R. Kronschnabel and Nell R. Kronschnabel, and being a portion of the hereinbefore described Parcel No. 1, and the just compensation together with severance damages to be paid to said defendants Leland R. Kronschnabel and Nell R. Kronschnabel, as the owners thereof, is the sum of Two Hundred Forty and No/100 (\$240.00) Dollars; and that said defendants Leland R. Kronschnabel and Nell R. Kronschnabel have and they are hereby given judgment against the United States of America for said sum of \$240.00, without interest; that the Clerk of this Court forthwith pay out of the registry of this Court to said defendants Leland R. Kronschnabel and [178] Nell R. Kronschnabel said sum of \$240.00, and upon payment thereof said judgment against the United States of America in favor of said defendants Leland R. Kronschnabel and Nell R. Kronschnabel shall be considered fully paid, discharged and satisfied;

It Is Further Adjudged and Decreed, that the value of the land taken, belonging to said defendant Florence Van Santen and being a portion of the hereinbefore described Parcel No. 1, and the just compensation to be paid to said defendant Florence Van Santen, as the owner thereof, is the sum of Ten and No/100 (\$10.00) Dollars, that no damages have accrued or will accrue to the land not condemned of which said Parcel No. 1 was a part, by reason of its severance from Parcel No. 1;

and that said defendant Florence Van Santen have and she hereby is given judgment against the United States of America for said sum of \$10.00, without interest; that the Clerk of this Court forthwith pay out of the registry of this Court to said defendant Florence Van Santen the sum of \$10.00, and upon payment thereof said judgment against the United States of America in favor of said defendant Florence Van Santen shall be considered fully paid, discharged and satisfied;

It Is Further Adjudged and Decreed, that the value of the land taken, belonging to said defendants Elmer Johnson and Hilma Johnson, hereinbefore described as Parcel No. 4, and the just compensation together with severance damages to be paid to said defendants Elmer Johnson and Hilma Johnson, as the owners thereof, is the sum of Two Hundred Forty-five and No/100 (\$245.00) Dollars; and that said defendants Elmer Johnson and Hilma Johnson have and they are hereby given judgment against the United States of America for said sum of \$245.00, without interest; that the Clerk [179] of this Court forthwith pay out of the registry of this Court to said defendants Elmer Johnson and Hilma Johnson said sum of \$245.00, and upon payment thereof said judgment against the United States of America in favor of said defendants shall be considered fully paid, discharged and satisfied;

It Is Further Adjudged and Decreed, that the value of the land taken, belonging to said defendants Leland R. Kronschnabel and Nell R. Kron-

schabel, hereinbefore described as Parcel No. 5, and the just compensation together with severance damages to be paid to said defendants Leland R. Kronschnabel and Nell R. Kronschnabel, as the owners thereof, is the sum of Six Hundred Seventy and No/100 (\$670.00) Dollars; and that said defendants Leland R. Kronschnabel and Nell R. Kronschnabel have and they are hereby given judgment against the United States of America for the sum of \$670.00, with interest on the sum of \$530.00 at the rate of 6% per annum from December 14, 1938 until said sum of \$530.00 is paid into the registry of this Court, the sum of \$140.00 having been deposited in Court with the filing of the aforesaid declaration of taking as the estimated just compensation for the taking of said Parcel No. 5; that the Clerk of this Court forthwith pay out of the registry of this Court to said defendants Leland R. Kronschnabel and Nell R. Kronschnabel the aforesaid sum of \$140.00; that the sum of \$530.00, the balance of the said award and the said interest provided for, shall be paid to the Clerk of the Court by the United States of America for the benefit of said defendants Leland R. Kronschnabel and Nell R. Kronschnabel, and on the payment thereof to the Clerk of the Court by the United States, said Clerk shall forthwith pay the same to said defendants Leland R. [180] Kronschnabel and Nell R. Kronschnabel, and upon payment thereof said judgment against the United States of America in favor of said defendants Leland R.

Kronschabel and Nell R. Kronschabel shall be considered fully paid, discharged, and satisfied;

It is further adjudged and decreed, that the value of the land taken, belonging to said defendant David Wilson Agnew, hereinbefore described as Parcel No. 6, and the just compensation to be paid to said defendant David Wilson Agnew, as the owner thereof, is the sum of Fifteen and no/100 (\$15.00) Dollars, that no damages have accrued or will accrue to the land not condemned, of which said Parcel No. 6 was a part, by reason of its severance from Parcel No. 6; and that said defendant David Wilson Agnew have and he hereby is given judgment against the United States of America for said sum of \$15.00, without interest; that the Clerk of this Court forthwith pay out of the registry of this Court to said defendant David Wilson Agnew the sum of \$15.00, and upon payment thereof said judgment against United States of America in favor of said defendant David Wilson Agnew shall be considered fully paid, discharged, and satisfied;

It Is Further Adjudged and Decreed, that the value of the land taken, belonging to said defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey, hereinbefore described as Parcel No. 7, and the just compensation, together with severance damages, to be paid to said defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey as the owners thereof, is the sum of Six Hundred and No/100 (\$600.00) Dollars; that said defendants Charles J. McConnell, Victor N.

Miller and John J. Humphrey [131] have heretofore withdrawn from the registry of the Court the sum of \$2,550.00 as aforesaid; that the United States of America have and it is hereby given judgment against said defendant Charles J. McConnell in the sum of Six Hundred Fifty and No/100 (\$650.00) Dollars, with interest at the rate of 6% per annum from November 3, 1939 until said judgment shall be paid; that the United States of America have and it is hereby given judgment against said defendant Victor N. Miller in the sum of Six Hundred Fifty and No/100 (\$650.00) Dollars, with interest at the rate of 6% per annum from November 3, 1939 until said judgment shall be paid; and that the United States of America have and it is hereby given judgment against said defendant John J. Humphrey in the sum of Six Hundred Fifty and No/100 (\$650.00) Dollars, with interest at the rate of 6% per annum from November 3, 1939, until said judgment shall be paid;

It is Further Adjudged and Decreed that none of the above-named defendants, other than Albert Rouge, Leland R. Kronschnabel, Nell R. Kronschnabel, Florence Van Santen, Elmer Johnson, Hilma Johnson, David Wilson Agnew, Charles J. McConnell, Victor N. Miller and John J. Humphrey, has any right, title or interest in or to any of the lands hereinbefore described as Parcels No. 1, No. 4, No. 5, No. 6, and No. 7; and said parcels of land are, and each is, hereby condemned and that title thereto in fee simple absolute has vested in the United States of America.

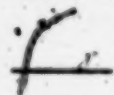
And It Is Further Adjudged and Decreed that neither [182] the plaintiff nor the defendants have judgment for costs incurred herein.

Dated: May 15, 1940.

MARTIN I. WELSH

United States District Judge

[Endorsed]: Filed May 15, 1940. Walter B. Mal-
ling, Clerk. [183]



[Title of District Court and Cause.]

**MOTION TO MODIFY, AMEND, AND/OR
CORRECT JUDGMENT, AND NOTICE OF
MOTION**

The defendant Charles J. McConnell, also known as Chas. J. McConnell, moves the court as follows:

(1). To modify the judgment entered and filed in the above entitled action on the 15th day of May, 1940, by vacating, annulling and deleting that part and provision of said judgment wherein and whereby it is adjudged and decreed "That the United States of America have and it is hereby given judgment against said defendant Charles J. McConnell in the sum of Six Hundred Fifty and no/100 (\$650.00) Dollars with interest at the rate of 6% per annum from November 3, 1939 until said judgment shall be paid," as set forth on page 20 of said judgment, on the grounds:

(a) That said judgment in favor of the United States of America and against defend-

ant Charles J. McConnell was made and entered without authority of law; [187]

(b) That the aforementioned provision of said judgment and the entry of same in said action is and constitutes an unauthorized exercise of judicial power;

(c) That the matter contained in said adjudication and judgment against said defendant Charles J. McConnell was not within the issues in said action and the court did not have jurisdiction to make such adjudication and award in the present action; and

(d) That said adjudication and award against defendant Charles J. McConnell is against law.

(2) To amend said judgment entered and filed in the above entitled action on the 15th day of May, 1940, by cancelling and striking therefrom the following provision appearing in said judgment commencing on line 2 of page 20 and ending on-line 7, page 20; viz.: "That the United States of America have and it is hereby given judgment against said defendant Charles J. McConnell in the sum of Six Hundred Fifty and no/100 (\$650.00) Dollars, with interest at the rate of 6% per annum from November 3, 1939 until said judgment shall be paid"; on the grounds:

(a) That said provision and adjudication against said defendant Charles J. McConnell is not properly a part of the judgment of the court in the above entitled action; and

(b) Was incorrectly and erroneously included and inserted in the judgment of the court herein; and

(c) The court was without authority to make and enter such a provision in said judgment.

(3) To correct said judgment by omitting and striking therefrom the following language and provision: "That the United States of America have and it is hereby given judgment against said defendant Charles J. McConnell in the sum of Six Hundred Fifty and no/100 (\$650.00) Dollars, with interest at the rate of 6% per annum from November 5, 1939 until said judgment shall be paid"; on the grounds:

(a) That said judgment was taken against this defendant without notice and through mistake, inadvertence and surprise; and [188]

(b) That such an adjudication was not within the issues in said action.

(4) To vacate, set aside and strike that part and provision of the judgment entered and filed in the above entitled action on the 15th day of May, 1940, beginning with the words "That said defendants Charles J. McConnell", et al., lines 30 and 31 of page 19, and ending with the words "Until said judgment shall be paid" in line 16 of page 20, and to insert in lieu thereof in line 30 of page 19 after the word "Dollars", the words "Which said compensation has been paid to said owners," on the grounds:

(a) That the inclusion of said provision in said judgment was not authorized by law and the court was without jurisdiction to make such adjudication in the present action against the defendant Charles J. McConnell or any of the owners of Parcel No. 7 of the land described in said judgment.

CARR AND KENNEDY

Attorneys for Charles J. McConnell
Address: Redding, California

To the plaintiff in the above entitled action and to Messrs. Frank J. Hennessy, Esq., United States Attorney, and R. B. McMillan, Esq., Assistant United States Attorney, attorneys for plaintiff:

Please take notice that the undersigned will bring the above motion on for hearing before the above entitled court, at the court room in the United States Post Office Building at Sacramento, California, on the 3rd day of June, 1940, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: May 23, 1940.

CARR AND KENNEDY

Attorneys for Defendant
Address: Redding, California

[189]

[Endorsed]: Filed May 24, 1940. Walter B. Maling, Clerk. [190]

[Title of District Court and Cause.]

MOTION TO MODIFY, AMEND AND/OR CORRECT JUDGMENT AND NOTICE OF MOTION

The defendants, Victor N. Miller and John J. Humphrey, move the court as follows:

[Here follows motion in same form as Motion of Defendant Charles J. McConnell as set forth above.]

[191]

[Endorsed]: Filed May 23, 1940. [195]

[Title of District Court and Cause.]

NOTICE

To U. S. Attorney, Sacramento; Carr & Kennedy, Redding; J. Oscar Goldstein, Chico:

—You are hereby notified that on Aug. 19, 1940 Judge Martin I. Welsh directed that motions to modify judgment granted in parts as follows: That the provisions contained on page 20 of judgment at lines 5 to 7, 10 to 11 and 14 to 16, as follows, "with interest at the rate of 6% per annum from Nov. 3, 1939 until said judgment shall be paid" be stricken out and in their place shall be added "with interest at the rate of 6% per annum from the date of this judgment until paid." Said motions to modify are in all other respects denied, in the above entitled case.

WALTER B. MALING

Clerk

Sacramento, California, Aug. 20, 1940. [196]

[Title of District Court and Cause.]

**MOTION OF DEFENDANTS CHARLES J. Mc-
CONNELL, VICTOR N. MILLER AND
JOHN J. HUMPHREY FOR A NEW
TRIAL**

To the above entitled Court and the Clerk thereof;
and to the above named Plaintiff, and to Messrs.
Frank J. Hennessy, United States Attorney,
R. B. McMillan, Esq., G. B. Hjelm, Esq., and
C. U. Landrum, Esq., plaintiff's attorneys; and
to all other interested parties and their attor-
neys:

Come now the defendants Charles J. McConnell,
Victor N. [199] Miller and John J. Humphrey, and
move the above entitled court for an order vacating
and setting aside the verdict of the jury herein on
the 10th day of February, 1940, and the judgment
entered thereon, and granting a new trial of the
above entitled action on the following grounds:

1. Insufficiency of the evidence to justify the verdict;
2. That said verdict is against law;
3. Inadequate and unjust compensation and damages; appearing to have been given under the influence of passion and prejudice;
4. Errors in law occurring at the trial and excepted to by said defendants;
5. Irregularity in the proceedings of the plaintiff by which the defendants were prevented from having a fair trial;

6. Orders of the Court by which the defendants were prevented from having a fair trial;

7. Accident or surprise which ordinary prudence could not have guarded against;

8. Irregularity in the proceedings of the jury by which the defendants were prevented from having a fair trial;

9. Misconduct of the jury;

10. Irregularities in the proceedings of the Court by which the defendants were prevented from having a fair trial;

That said motion as to all of the aforesaid grounds will be made upon the minutes of the Court and also upon affidavits.

J. OSCAR GOLDSTEIN

Attorney for defendants Victor N.
Miller and John J. Humphrey
CARR & KENNEDY

Attorneys for defendant
Charles J. McConnell

[Endorsed]: Filed Feb. 20, 1940. [200]

[Similar motions were made by defendants David Wilson Agnew, Elmer Johnson et ux, Albert Rouge, Leland R. Kronschnabel et ux, and Florence Van Santen.]

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73-B**

Notice is hereby given that Victor N. Miller, also known as Vic Miller; John J. Humphrey, also known as John J. Humphrey, Sr., also known as J. J. Humphrey; Charles J. McConnell, also known as Chas. J. McConnell; Elmer Johnson and Hilma Johnson, his wife; David Wilson Agnew; Albert Rouge; and Florence Van Santen, defendants above named, hereby appeal to the Circuit Court of Appeals of the Ninth Circuit, from the final judgment entered in this action on May 15, 1940.

Dated: August 12, 1940. [206]

J. OSCAR GOLDSTEIN

Attorney for Defendants Victor N. Miller, also known as Vic Miller; John J. Humphrey, also known as J. J. Humphrey, also known as John J. Humphrey, Sr.; and Florence Van Santen

CARR AND KENNEDY

Attorneys for Defendants Charles J. McConnell, also known as Chas. J. McConnell, and David Wilson Agnew

R. P. STIMMEL

Attorney for Defendant Albert Rouge and Elmer Johnson and Hilma Johnson, his wife

[Endorsed]: Filed Aug. 13, 1940. Walter B. Maling, Clerk. [207]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Charles J. McConnell, Principal, and Dudley V. Saeltzer and Geo. A. Grotefend as sureties, are held and firmly bound unto United States of America in the sum of \$250.00 lawful money of the United States for the payment of which, will and [Illegible] to be made, we bind ourselves, our heirs, [Illegible] jointly and severally by these presents.

Sealed with our seals and dated this 7th day of November, in the year of our Lord One Thousand Nine Hundred and Forty.

Whereas lately in the District Court of the United States for the Northern District of California, Northern Division, in a suit pending in said court between United States of America, plaintiff, and said Charles J. McConnell and others, defendants, numbered [208] 4027-L, judgment was rendered against the defendants and appellants hereinafter named, and the said defendants and appellants have filed Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation in such, that if the said appellants, Charles J. McConnell, Elmer Johnson and Hilma Johnson, his wife, David Wilson Agnew, Victor N. Miller, John J. Humphrey, Albert Rouge, and Florence Van

Santen shall prosecute their appeal to effect, and pay all costs if said appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then the above obligation to be void, also to remain in full force and virtue.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may upon notice to the Sureties above named of not less than ten (10) days, proceed summarily in said suit to ascertain the amount which said Sureties are bound to pay on account of such breach, and render judgment therefore against said Sureties and award execution therefor.

CHARLES J. McCONNELL (Seal)

DUDLEY V. SAELTZER (Surety)

GEO. A. GROTEFEND (Surety)

State of California

County of Shasta—ss.

Dudley V. Saeltzer and the
sureties whose names are subscribed to the foregoing bond, being sworn, each for himself, says: I am one of the sureties named in the above undertaking. I am a resident and house holder within the State of California, and am worth the sum in the said undertaking specified over and above all my just debts and liabilities, exclusive of property exempt from execution.

DUDLEY V. SAELTZER

GEO. A. GROTEFEND

Subscribed and sworn to before me, this 7th day of November, 1940.

[Seal]

LAURENCE J. KENNEDY

Notary Public.

[Endorsed]: Filed Nov. 8, 1940. [209]

[Title of District Court and Cause.]

**DEFENDANTS AND APPELLANTS
STATEMENT OF POINTS ON APPEAL**

Come now the defendants and appellants Victor N. Miller, John J. Humphrey, Charles J. McConnell, Elmer Johnson and Hilma Johnson, his wife, David Wilson Agnew, Albert Rouge, and Florence Van Santen, and present herewith their statement of the points on which they intend to rely on the appeal in [210] the above entitled action;

I.

The court erred in excluding the evidence offered by the defendants and appellants to show the fair market value on the 14th day of December, 1938 of their respective parcels of land, taken by plaintiff and the severance damages suffered by them, respectively, from such taking, as of the 14th day of December, 1938.

II.

The court erred in its rulings excluding from defendants' evidence of values and damages, and from the consideration of the jury, any increase or

increment in the value of the respective parcels of land of said defendants and appellants affected by said proceeding in eminent domain, from and after the 26th day of August, 1937 and up to the 14th day of December, 1938, due to the Central Valley Project.

III.

The court erred in requiring the defendants and appellants, in presenting their evidence of damages resulting from said taking to exclude from consideration any increase or increment in the valuation of their lands from and after the 26th day of August, 1937, due to the Central Valley Project.

IV.

The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, Thomas ... Mapel, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project [211] from the 26th day of August, 1937.

V.

The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, F. C. Herrmann, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and ap-

pellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project from the 26th day of August, 1937.

VI.

The court erred to the prejudice of defendants and appellants in admitting the testimony of the witness, Thomas G. Mapel, and the witness, F. C. Herrmann, as expert witnesses for the plaintiff, as to values of the properties of defendants and the damages suffered by them, when it affirmatively appeared that they did not and could not qualify as expert witnesses, nor as witnesses as to any facts pertaining to values and damages in said action.

VII.

The court erred in admitting into evidence any of the testimony of the witnesses, Thomas G. Mapel and F. C. Herrmann, in respect to the values of the respective parcels of land of defendants and appellants taken by plaintiff, or the damages suffered by them.

VIII.

The court erred in its charge to the jury by giving the following instructions proposed by the plaintiff viz: Plaintiff's Instructions No. 3, 4-a, 13, 13-a, and 18, to which defendants and appellants duly excepted. [212]

IX.

The court erred in its charge to the jury by failing and refusing to give the following instructions

requested by defendants and appellants viz: instructions 9, 16, 20, and 22.

X.

The defendants and appellants, as a result of the rulings of the court upon the admission and exclusion of evidence, and its charge to the jury, were deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States and the provisions of the Constitution of the State of California.

XI.

The defendants and appellants, by the verdict and judgment herein, have been deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States and the provisions of the Constitution of the State of California.

XII.

The defendants and appellants, by the verdict and judgment in this proceeding, and the rulings of the court during the trial, hereinabove assigned as error, have been deprived of their respective properties without due process of law, in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States and the Constitution of the State of California.

XIII.

The defendants and appellants, as a result of the rulings of the court upon the admission and ex-

clusion of testimony in regard to the values of their lands taken by [213] plaintiff and the damages suffered by them, and as a result of the instructions given by the court, were prevented from having a fair trial, and the verdict of the jury was a miscarriage of justice.

XIV.

The defendants and appellants, as a result of the rulings of the court upon the admission and exclusion of evidence, and its instructions to the jury in respect to fixing the value of defendants' properties and the damages suffered by them, were denied the uniform operation of the laws, and the equal protection of the law in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States and the Constitution of the State of California.

XV.

The court erred in awarding judgment in favor of the plaintiff and against each of the defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey severally for the sum of \$650.00. (Judgment, page 20, lines 2-16.)

XVI.

Said judgment of the court awarding judgment in favor of the plaintiff and against the defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey, severally, for the sum of \$650.00 is against law.

XVII.

The court was without jurisdiction to award the plaintiff judgment against the defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey, for the recovery from each of said defendants of the sum of \$650.00, or any sum, or at all.

XVIII.

The evidence was insufficient to justify the verdict rendered by the jury in respect to the respective parcels of land of the defendants and appellants taken by plaintiff, and [214] the damages awarded for such taking; and said verdict is against law.

XIX.

The compensation and damages awarded to defendants and appellants, respectively, by the verdict and judgment herein is inadequate and unjust, and said verdict appears to have been given under the influence of passion and prejudice.

XX.

The court erred in denying the motions of the defendants and appellants, and each of them, for a new trial.

XXI.

The court erred in granting in part only the motion of defendants Miller and Humphrey and the motion of defendant Charles J. McConnell to

modify, amend and/or correct the judgment entered in said action, and otherwise denying said motions.

J. OSCAR GOLDSTEIN

Attorney for Defendants

Victor N. Miller, et al.

CARR & KENNEDY,

Attorneys for Defendants

Charles J. McConnell, et al.

R. P. STIMMEL

Attorney for Defendants

Albert Rouge, et al. [215]

[Endorsed]: Filed Oct. 28, 1940. Walter B. Maling, Clerk. [216]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL EXHIBITS AND REPORTER'S TRANSCRIPT TO CIRCUIT COURT OF APPEALS.

It appearing to the Court that an appeal having been taken in this cause to the Circuit Court of Appeals, the original exhibits should be inspected by the Appellate Court and sent to the Appellate Court in lieu of copies;

It Is Ordered, that in lieu of copies, all of the original exhibits produced and filed in this cause, and also the original Reporter's Transcript be sent by the clerk of this Court to the Circuit Court of Appeals for the Ninth Circuit as a portion of the

record on appeal to be used in the Circuit Court of Appeals, and subject to such orders as may be made in the Circuit Court of Appeals relating to the printing of the same or portions thereof, and subject to such other orders as may be made in that court, [217] and that the same may be transported to the Circuit Court of Appeals by the United States mail and returned to this court upon order of the Circuit Court of Appeals.

Dated: Nov. 9, 1940.

MARTIN I. WELSH,

United States District Court.

[Endorsed]: Filed Nov. 9, 1940. [218]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Come now the defendants, Victor N. Miller, John J. Humphrey, Charles J. McConnell, Elmer Johnson and Hilma Johnson, his wife, David Wilson Agnew, Albert Rouge, and Florence Van Santen, and ~~do hereby~~ designate the following as the contents of ~~their~~ record on appeal: [219]

1. Amended complaint in eminent domain (omitting paragraph VIIb, VIc, and VIe).
2. Declaration of taking (omitting title of court and cause; also omitting parcel No. 2, parcel No. 3, and parcel No. 5).

3. Judgment on the declaration of taking (omitting title of court and cause; also omitting parcel No. 2, parcel No. 3, and parcel No. 5).

4. Answer of defendants Victor N. Miller and John J. Humphrey.

5. Answer of defendant Charles J. McConnell.

6. Answer of defendants Elmer Johnson and Hilma Johnson.

7. Answer of defendant David Wilson Agnew.

8. Answer of defendant Albert Rouge.

9. Answer of defendant Florence Van Santen.

10. Verdict of the jury.

11. Judgment.

12. Motion of defendant Charles J. McConnell to modify, amend and/or correct judgment.

13. Motion of defendants Victor N. Miller and John J. Humphrey to modify, amend and/or correct judgment.

14. Notice of order entered August 19, 1940, granting motions to modify judgment in part, and denying motions in other respects.

15. Testimony of witnesses, to be copied from Reporter's Transcript as follows:

Mellin, Gilbert F.

Reporter's Transcript Page 18 to page 31, line 8.

Reporter's Transcript Page 35, line 2, to page 53, line 10 [220]

Pearl, George L.

Reporter's Transcript Page 56 to 59 inclusive.

Reporter's Transcript Page 64 to line 27, page 68.

Reporter's Transcript Page 79, line 2 to page 82, line 11.

Reporter's Transcript Page 83, lines 15 to 28.

Reporter's Transcript Page 84, lines 20 to 30.

Reporter's Transcript Page 85, lines 13 to 22.

Reporter's Transcript Page 87, line 2 to page 93,
line 4.

Reporter's Transcript Page 104, line 4 to page
105, line 8.

Reporter's Transcript Page 113, lines 2 to 12.

Reporter's Transcript Page 115, lines 9 to 23.

Humphrey, John J.

Reporter's Transcript Page 116 to page 142, line
26.

Reporter's Transcript Page 165, line 4, to page
168, line 25.

Miller, Victor N.

Reporter's Transcript Pages 169 to 179.

Kronschabel, Leland R.

Reporter's Transcript Page 179, line 19, to page
182, line 21.

Reporter's Transcript Page 187, line 21, to page
188, line 20.

O'Connor, Francis

Reporter's Transcript Pages 204 to 209.

Reporter's Transcript Pages 284 to 289.

Rouge, Albert

Reporter's Transcript Page 209 to 213, line 17.

Johnson, Elmer

Reporter's Transcript Page 235, line 13 to page
236, line 10.

Reporter's Transcript Page 241, line 5 to line 21.

Reporter's Transcript Page 242, lines 26 to 30.

Reporter's Transcript Page 243, lines 23 to 30.

Reporter's Transcript Page 244, lines 6 to 28.

Van Santen, Florence, Mrs.

Reporter's Transcript Page 246, line 23 to page 247, line 10.

Agnew, David Wilson

Reporter's Transcript Pages 263 to 277, line 21.

Reporter's Transcript Page 280, line 26 to page 281, line 6.

Mapel, Thomas G.

Reporter's Transcript Page 336 to page 341, line 23.

Reporter's Transcript Page 344, line 11, to page 354, line 6.

Reporter's Transcript Page 356, line 18, to page 363, line 18. [221]

Mapel, Thomas G. Cross Examination

Reporter's Transcript Page 381, line 12 to page 384, line 24.

Reporter's Transcript Page 396, line 22 to page 397, line 7.

Reporter's Transcript Page 408, line 28 to page 410, line 10.

Reporter's Transcript Page 435, line 9 to page 437, line 1.

Hermann, F. C.

Reporter's Transcript Page 456, line 1 to page 463, line 17.

Reporter's Transcript Page 464, line 8 to page 464, line 19.

Reporter's Transcript Page 465, line 1 to 14.

Reporter's Transcript Page 467, line 10 to line 30.

Reporter's Transcript Page 469, line 7 to page 470, line 26.

16. Exhibits as follows:

Plaintiff's Exhibits Nos. 1, 2, 3, 4, and 9; Defendants' Exhibits A, B, C, D, E, F, and G. (Original Exhibits to be sent to Circuit Court of Appeals).

17. Charge to the jury:

Instructions given by the court;

Instructions requested by defendants and appellants and refused by the court.

18. Motions of defendants and appellants for a new trial, and ruling of the court denying said motions.

19. Notice of appeal.

20. Appellants' designation of contents of record on appeal.

21. Appellants' statement of points on appeal.

22. Appellants' bond for costs of appeal.

J. OSCAR GOLDSTEIN

Attorney for Defendants

Victor N. Miller, et al.

CARR & KENNEDY

Attorneys for Defendants

Charles J. McConnell, et al.

R. P. STIMMEL

Attorney for Defendants

Albert Rouge, et al. [222]

[Endorsed]: Filed Oct. 28, 1940. Walter B. Maling, Clerk. [223]

[Title of Court and Cause.]

No. 4027-L

**APPELLEE'S COUNTER-DESIGNATION OF
THE CONTENTS OF THE RECORD ON
APPEAL.**

Comes now the appellee, United States of America, by Frank J. Hennessy, Esq., United States Attorney, for the Northern District of California, and R. B. McMillan, Esq., Assistant United States Attorney, and does hereby designate the following as additions to the contents of the record on appeal:

a. Application of defendants, Charles J. McConnell, Victor N. Miller and John J. Humphrey, to obtain a portion of money deposited in Court with respect to parcel No. 7.

b. Order of Court granting said application.

c. Receipt showing payment pursuant to above order.

d. Testimony of witnesses to be copied from reporter's transcript, and to be inserted in appropriate places after testimony designated by appellants, as follows:

Pearl, George L.

Reporter's Transcript Page 69, line 16 to page 70, line 6

Reporter's Transcript Page 72, line 9 to line 18

Reporter's Transcript Page 106, line 25 to page 109, line 29

Reporter's Transcript Page 110, line 13 to page 112, line 25

Humphrey, John J.

Page 158, line 30 to page 163, line 13

Kronsnabel, Leland R.

Reporter's Transcript Page 192, line 2 to page 194, line 6

Reporter's Transcript Page 194, line 19 to page 196, line 7

Reporter's Transcript Page 198, line 9 to page 199, line 4.

Rouge, Albert

Reporter's Transcript Page 213, line 18 to page 218, line 20

Reporter's Transcript Page 223, line 11 to page 224, line 24.

Reporter's Transcript Page 228, line 15 to page 229, line 17

Johnson, Elmer

Reporter's Transcript Page 236, line 23 to page 239, line 7

Reporter's Transcript Page 239, line 13 to line 18

Reporter's Transcript Page 239, line 23 to page 240, line 6

Reporter's Transcript Page 240, line 11 to line 19

Van Santen, Florence, Mrs.

Reporter's Transcript Page 248, line 27 to page 250, line 6

Agnew, David Wilson

Reporter's Transcript Page 281, line 17 to page 282, line 11

Reporter's Transcript Page 282, line 24 to page 283, line 17 [224]

O'Connor, Francis

Reporter's Transcript Page 292, line 19 to page
293, line 6

Glaha, Bernard G.

Reporter's Transcript Page 297, line 20 to page
298, line 5

Reporter's Transcript Page 307, line 22 to page
308, line 6

Mellin, Gilbert F.

Reporter's Transcript Page 310, line 14 to page
311, line 19

Reporter's Transcript Page 312, line 28 to page
313, line 17

Mapel, Thomas G.

Reporter's Transcript Page 384, line 25 to page
385, line 11

Reporter's Transcript Page 389, line 5 to page
390, line 1

Reporter's Transcript Page 396, line 4 to line
22

Reporter's Transcript Page 406, line 14 to line
28

Reporter's Transcript Page 408, line 14 to line
27

Herrmann, F. C.

Reporter's Transcript Page 463, line 21 to page
464, line 7

Reporter's Transcript Page 464, line 22 to line
30

Reporter's Transcript Page 469, line 3 to line 6

Reporter's Transcript Page 476, line 16 to page
477, line 15

Reporter's Transcript Page 486, line 8 to page 489, line 26

e. Exhibits as follows:

Plaintiff's Exhibits 6 and 10.

Defendant's Exhibits "D for Identification" and "G for Identification."

(Original exhibits to be sent to Circuit Court of Appeal.)

FRANK J. HENNESSY,

United States Attorney.

R. B. McMILLAN,

Assistant United States Attorney. [225]

[Endorsed]: Filed Nov. 7, 1940. Walter B. Maling, Clerk. [226]

**CERTIFICATE OF CLERK TO
TRANSCRIPT ON APPEAL**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California do hereby certify that the foregoing 226 pages, numbered from 1 to 226, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. Certain Parcels of Land in the County of Shasta, et al., No. 4027-L, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation and Counter Designation of Portions of Record to be contained in Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of \$27.05; and that the same has been paid to me by the attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 9th day of November, 1940.

[Seal]

WALTER B. MALING,

Clerk.

By B. E. O'HARA,

Deputy Clerk. [227]

[Title of District Court and Cause.]

TESTIMONY [230]

The Court: Will Counsel stipulate that the jurors are all present and in their proper places?

Mr. Landrum: Yes, your Honor.

Mr. Goldstein: So stipulated.

The Court: You may proceed.

Mr. Landrum: We will call Mr. Mellin.

GILBERT F. MELLIN,

called for the Government; sworn.

The Clerk: Will you please state your name to the Court and jury. A. Gilbert F. Mellin.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Mellin?

A. Sacramento.

(Testimony of Gilbert F. Mellin.)

Q. How long have you lived in Sacramento?

A. Twenty-five years.

Q. How old a man are you?

A. Forty-six.

Q. What is your business?

A. Civil engineer.

Q. What connection if any do you have with the Central Valley Water Project?

A. I am Chief Right-of-Way Agent.

Q. As such Chief Right-of-Way Agent of what do your duties consist?

A. Of buying of the land required for construction purposes on the Central Valley Project.

Q. I understood you to say you are an engineer?

A. I am.

Q. Of what schools or institutions are you a graduate?

Mr. Goldstein: We will stipulate to his qualifications.

Mr. Landrum: Yes, but I think the jury would like to know something about them.

The Court: Proceed.

A. I am a graduate of the University of California. I have [247] practiced engineering since graduation. Completed the course in 1915; first worked for the Highway Commission until 1916, at which time I completed some small work and received my diploma. Then went to work for the State Reclamation Board on the Sacramento Flood Control Project during which work I worked over

(Testimony of Gilbert F. Mellin.)

the assessments of all of the land extending from Butte City on the north to Stockton and Tracy on the south. I then went into business for myself as civil engineer, handling construction work, appraisals, and valuation assessments for several reclamation and water storage districts. I then returned in 1929 to work for the State of California on the Central Valley Project. My duties then being the classification of all of the lands of the Sacramento Valley and of the foothills of the San Joaquin, in the determination of the water requirements needed to irrigate those lands. In 1932 I returned to work with the State Reclamation Board, again on the Sacramento Flood Control project, and was in charge of the acquisition—first the appraisal and then the acquisition of the lands required for the Sacramento Flood Control Project in their cooperative work with the Army Engineers. On that several hundred miles of levee rights of way were acquired and many thousands of acres of land acquired for flowage easement in such areas as the Yolo By-pass and the Butte Basin. On April 1st, 1936 I went to work for the U. S. Bureau of Reclamation in charge of the Rights-of-Way Department, and have been at that work since.

Q. Mr. Mellin, I will ask you when you first became acquainted, and when you first went upon the lands involved in this action.

A. The first viewing of these lands, when they were viewed as lands, was in 1929.

(Testimony of Gilbert F. Mellin.)

Q. And what was your purpose at that time?

A. Classification of the lands to determine water requirements [248] for irrigation of the irrigable lands of the Valley.

Q. Do you know what the physical situation was with relation to these lands during 1929 and up to the present date?

A. I do.

Q. Now, Mr. Mellin, in connection with your duties as chief right-of-way agent do you also have charge of the making of maps and surveying of this property?

A. I do.

Q. Under whose direction were the surveys of the properties involved in this action made?

A. They were made under my direction by the Kennett Division.

Q. By the way, when did you first go on the property where Boomtown is situated?

A. 1929.

Q. Mr. Mellin, I show you this map. I will ask you to examine it and state what it is.

A. This is a map prepared under my direction showing the existing route of the Central Pacific Railroad and the required relocation of that railroad around Shasta Reservoir.

Q. Does that correctly map and depict conditions of this project insofar as it goes, and particularly in relation to the lands involved in this action?

A. It does.

Mr. Landrum: At this time, if the Court please, we offer it in evidence as Government's Exhibit whatever it may be marked.

(Testimony of Gilbert F. Mellin.)

Mr. Goldstein: No objection.

Mr. Kennedy: May we ask as of what date it purports to show the conditions?

A. Insofar as the map is concerned, it shows the conditions at the present time and since the inception of the project and finally after its completion.

Mr. Landrum: Q. In other words, it is a map showing what the project will be? That is what it is? [249]

Mr. Goldstein: We have no objection.

The Court: Admitted.

(The map referred to was marked Government's Exhibit No. 1.)

Mr. Landrum: May we put it on the easel, your Honor?

(The map was placed upon the blackboard.)

Mr. Landrum: Q. Mr. Mellin, will you be good enough to step down to this easel and explain to the jury what is depicted on Government's Exhibit 1.

A. This map shows the country and the project from the city of Redding to the station of Delta. The Sacramento River is indicated by the deep blue line, arriving at this point to the mouth of Pitt River, which extends to the east, and at this location the mouth of McCloud River,—the rivers being shown in deep blue. The existing Central Pacific Railroad is indicated by the black line following the river and extending from Redding to the station of Delta. Shasta Dam, with the resulting reservoir, is depicted—the dam by a black line, so labeled, and the reservoir by an

(Testimony of Gilbert F. Mellin.)

irregular boundary, within which the area is colored green. All of the reservoir is not shown.

Q. Right there, Mr. Mellin, may I ask whether or not the Central Pacific Railroad as it is shown on that map is within the green area and would be flooded on the completion of the project if it is left there?

A. From Shasta Dam to Delta the existing railroad is within, and will be flooded by the reservoir. The portion from the dam southerly to Redding lies in the American—or in the Sacramento Canyon, and requires rebuilding in order that the new railroad depicted in yellow may pass beyond the reservoir flow line

The Court: Q. When you said “flooded”, did you mean that the land would be covered by water eventually?

A. Covered by—the land depicted in green and that portion of the [250] railroad as it now exists will be covered by water stored behind the Shasta Dam.

The Court: I just suggested that for the benefit of the jurors.

Mr. Landrum: Q. Now, Mr. Mellin, can you point out for us on Government's Exhibit 1 the Kinsella property?

A. I can point to the location of the Kinsella property at Buckeye, the property being indicated by the red dots just under the word B at Buckeye.

Q. Can you point out and indicate to us on Government's Exhibit 1 Boomtown?

(Testimony of Gilbert F. Mellin.)

A. Boomtown is an area in the vicinity of the location where "Boomtown" is written on the map, covering a considerable area: The area which the railroad runs on, Parcel 1, Parcel 4 and Parcel 5 and Parcel 7 as shown in red pencil.

Q. Now, Mr. Mellin, is there anything else depicted by that map which I have not asked you about particularly which this Court and Jury might be interested in, that you have not given us?

A. The beginning and end of the railroad relocation are indicated. The beginning of the railroad relocation is at the City of Redding, and the end is near Delta, at the northern end of the flooded area back of Shasta Dam.

Q. Just one moment. Counsel suggests that we might be interested in the distance.

A. Yes. The distance from Redding to the end of the railroad relocation by the existing railroad is some thirty-seven miles; that by the relocated railroad is about thirty miles.

The Court: Q. Would you mind explaining to the Jury what you mean by relocating?

A. The relocated railroad is that railroad now being constructed on which the properties condemned in this action are located, and as indicated on Exhibit 1 by the yellow line. [251]

Juror Emmet M. Johnson: What is the distance from Boomtown to the dam site?

A. In a straight line it is slightly more than three miles; by road a little longer.

(Testimony of Gilbert F. Mellin.)

The Court: Any further questions from the Jury?

Mr. Landrum: Q. Mr. Witness, I hand you what purports to be another map and I will ask you to examine that and state what it is.

A. This is a map prepared under my direction showing Section 30 of Township 33 North, Range 4 West, and on the map of the section showing the right-of-way for the railroad relocation at a scale of about—of two hundred feet to the inch. It indicates the Parcels 1, 4, 5 and 7 which are in one of the combined actions in this case.

Q. Is that map a correct representation of the situation as it exists on the ground there?

A. It is.

Mr. Landrum: I offer it in evidence, if the Court please.

Mr. Goldstein: No objection.

The Court: Admitted.

(The map referred to was marked Government's Exhibit No. 2.)

Mr. Landrum: May we put it on the easel, your Honor?

The Court: Yes.

(Thereupon the map was placed upon the black-board.)

Mr. Landrum: Q. Now, Mr. Mellin, I will ask you to again step down to the easel and take the pointer and point out to this court and jury what is shown on Government's Exhibit 2.

(Testimony of Gilbert F. Mellin.)

A. Exhibit 2 shows in the outer boundary the location of the extreme lines of Section 30. Crossing diagonally from the north line near the center of the section to the southwest corner of the section and enclosed between two heavy parallel lines is the [252] right-of-way for the railroad relocation through this section. Within that right-of-way are indicated the several parcels in the Johnson case: Parcel No. 1, Rouge; Parcel No. 4, Elmer Johnson; Parcel No. 5, Kronschnabel; Parcel No. 6, Agnew; Parcel No. 7, McConnell, Miller and Humphrey. These parcels are each shown by name and the acreage taken in each case is indicated. Parcel No. 1 in total being 3.17 acres; Parcel No. 4 being 4.81 acres; Parcel No. 5 being 1.31 acres; Parcel No. 6 being $\frac{2}{100}$ ths of an acre; Parcel No. 7 being 10.61 acres. On this map is shown Boomtown Unit No. 4,—enclosed with a heavy boundary and so labeled. Also Boomtown Unit No. 2 and Boomtown Unit No. 9. In addition are shown total ownerships and the severed areas of the parties in the action. The Rouge tract being a complete tract. Parcel No. 4 being 4.81 acres in the central portion of a 17 acre tract. Parcel No. 5 being 1.31 acres, with part of the ownership containing $\frac{87}{100}$ of an acre lying north, and another point containing 3.10 acres lying south of the right-of-way parcel being taken. On Parcel 7 the ownership includes—outside of subdivision—two parcels in triangular shape, each of which contain $\frac{22}{100}$ of an acre.

(Testimony of Gilbert F. Mellin.)

Q. Now, Mr. Mellin, you were present on yesterday when the jury viewed these premises, were you not? A. I was.

Q. Will you,—in order that they may more familiarize themselves with this map as they saw it on the ground, will you trace on that map the route they took in viewing this property, and then trace the route which they took when they went around to see that seven acres which was discussed and where that seven acres is.

A. The jury came from the west, stopped at Parcel No. 1 at the intersection of the west line of the right-of-way with the south line of the county road, which is now Grand Coulee Boulevard. [253]. At that property we first viewed the Van Santen parcel, which is part of Parcel No. 1.

Q. All right; now, right while you are on that, tell us how large that Van Santen parcel is.

A. That parcel is 5.17 of a—5.17 feet in width and has a length of 109 feet—to my closest recollection. It contains $12/1000$ of an acre. At that same location we viewed the Rouge part of Parcel No. 1, which was a part of a 40 foot strip of land—that part within the right-of-way tract extending from the north line of Main Street to the north line of the right-of-way, and containing between $4/100$ and $5/100$ of an acre. We viewed the western part of the Kronschnabel portion of Parcel 1 at that location, then went on to the top of the railroad grade at the south line of Grand Coulee Boulevard,

(Testimony of Gilbert F. Mellin.)

where the remaining portion of Parcel 1 was entirely visible. Leaving that location we walked up the railroad and crossed to the western side of the right-of-way viewing the Agnew parcel, which contains $\frac{2}{100}$ of an acre, and is 5.21 feet in width. We then viewed a portion of North Boulevard—not mapped, but indicated at a number I am placing, “4” on the map. Returning from that location we then walked the length of Parcel No. 7—the two $\frac{22}{100}$ acre parcels being pointed out when we had arrived at the east line of Parcel No. 7. The southerly $\frac{22}{100}$ of an acre was indicated on the ground by certain flags that were located in the railroad right-of-way fence, and the northern $\frac{22}{100}$ of an acre was located by flags again located on the right-of-way fence, the eastern one of which was near the brow of the hill. The jury then passed to Parcel No. 4, stopped near the northeastern corner of Parcel 4, where they viewed the land of Elmer Johnson severed from his holding and lying north of the railroad right-of-way. [254]

Q. Now, right there, there has been some discussion here with reference to a cutting up of a seven-acre tract or something. Will you, in order that the jury may get their minds properly fixed on that, will you please tell us what the character of that land over to the left is there (indicating on map)?

A. The land to the north of the railroad right-of-way, containing 6.1 acres, is principally on a

(Testimony of Gilbert F. Mellin.)

slope of a hill, flattened in its northeastern part to a small area of level land. The entire parcel is brush covered with a scattering of trees, leaving the—

Mr. Goldstein: I beg your pardon, Mr. Mellin, I think the jury will be in a better position to understand the testimony if you will call that the Johnson land.

Mr. Landrum: Yes, that is the Johnson land.

The Witness: Yes, that is the Johnson property. At that same location, marked 6 on the map, we crossed into Parcel No. 5, and viewed Parcel 5.

Q. Whose land is that?

A. That is the Kronschnabel tract—and viewed 87/100 of an acre lying north on the railroad right-of-way.

Q. What is the character of that?

A. That is land relatively flat lying, covered with brush and some scattering of trees. We then crossed through Parcel 5 to a point near the south line, where we viewed the remaining property to the south and viewed the western—or, rather, the southern portion of the area to be taken.

Q. Then, where did you go?

A. Having viewed all of the properties directly on the railroad, we returned to the—by the same route that we had gone to the property—returned to the location at Grand Coulee Boulevard near the underpass, where the jury then took the stage and we [255] endeavored to reach by the route indicated

(Testimony of Gilbert F. Mellin.)

with pencil the lands which we had previously viewed from the railroad right-of-way, being the southern severed portion of the Johnson Tract and the Kronschnabel Tract. We found the road barricaded, and ceased viewing these parcels at the intersection of Main Street and Montana Street.

Q. Now, will you mark that very plainly, as far as this jury got there.

A. I have marked it with a cross and "M."

Q. Now, you said you found the road barricaded. What was the condition of that road? Could that bus get across there?

A. No. The road had been closed with a sapling or tree extending across it because of a rather extensive mud puddle in the portion of the road about one block north of the termination of the viewing of the land in the vicinity of Boomtown.

Q. All right, thank you, Sir. Mr. Mellin, I now show you another map and I will ask you to examine that and state what it is, Sir.

A. This is a map of Section 25, Township 33 North, Range 5 West, Mount Diablo Meridian, showing the right-of-way for railroad relocation, at a scale of 200 feet to the inch. On this map is delineated Parcel No. 1,—the Kronschnabel tract—I believe referred to, as Kronschnabel, Miller and Humphrey—and the Van Santen and Rouge portions of this Parcel No. 1, together with Boomtown Units 5 and 10.

Q. Are those same parcels shown on Government Exhibit 2 which is on the board or not?

(Testimony of Gilbert F. Mellin.)

A. The Van Santen and Rouge parcels are not shown on Government's Exhibit 2.

Mr. Landrum: At this time, if the Court please, we offer this [256] map in evidence.

Mr. Goldstein: No objection.

The Court: Received.

(The map referred to was marked Government's Exhibit No. 3 and was placed upon the blackboard.)

Mr. Landrum: Q. Now, Mr. Mellin, will you be good enough to step over to the easel again for us and go over Government's Exhibit 3 for the benefit of this court and jury.

A. Exhibit 3 shows the exterior boundaries of Section 25, the boundary of the land owned now by the United States upon which the Government Camp is located, shows Parcel No. 1 of the taking in this suit, shows Unit No. 5 of Boomtown, and Unit No. 10 of Boomtown, Grand Coulee Boulevard being the curved line extending from the southeast corner of the map to the west line of the section a little north of the mid point of that line. (Indicating). Parcel No. 1 in total contains 3.17 acres. The Van Santen portion of that parcel contains $\frac{12}{1000}$ of an acre, while the Rouge portion of the parcel contains between 4 and $\frac{5}{1000}$ of an acre, being a portion of a 40 foot strip preserved by Rouge, who was the original owner of all of this section—except the west one-half of the northwest one-quarter—when he sold Boomtown Unit No. 5,

(Testimony of Gilbert F. Mellin.)

in order that he might have access from the road to his remaining—

Mr. Stimmèl: We object to that statement, your Honor, as incompetent, irrelevant and immaterial, not tending to prove any issue in this case. The purpose for which a man may or may not preserve a section of his land does not determine its fair market value or any value, and we ask that the jury be directed to disregard the statement made by the witness.

The Court: The objection is sustained, and you ladies and gentlemen will disregard the remark of the witness in regard to [257] the purpose.

Mr. Landrum: Q. Mr. Mellin, will you be good enough to state to this court and jury whether or not Government's Exhibit 3 does show the piece of land preserved by Mr. Rouge?

A. It does show that.

Q. How wide is it? A. Forty feet.

Q. Where does it begin and where does it end on that map?

A. It begins at the north line of Main Street, extends to the north line of Boomtown Unit No. 5.

Q. I believe you said on yesterday when you and the jury viewed the property you returned over the Agnew property and went over to view this reserved strip, is that right?

A. We viewed the reserved strip and adjoining it on the east, viewed North Boulevard.

Q. Now, this North Boulevard joins that re-

(Testimony of Gilbert F. Mellin.)

served strip—Can you point out to us on Government's Exhibit 3 right where North Boulevard is?

A. North Boulevard is a 40 foot strip lying just to the east of the east line of Section 25 in Boomtown Unit No. 4. I have sketched it on the map and labeled it in pencil, "North Boulevard".

Q. All right. Mr. Witness, I show you now another map and I will ask you to examine that and state what it is.

A. This is a map of the railroad right-of-way through Boomtown in Shasta County, California at a scale of 50 feet to the inch, depicting thereon the streets colored in yellow and Parcel No. 1 with its divisions for Van Santen and Rouge and Parcel No. 6, Agnew; and Parcel No. 7, McConnell, Miller and Humphrey.

Q. Those parcels, however, are also shown on Government's Exhibits 2 and 3?

A. They are.

Mr. Landrum: We offer that in evidence at this time, if the [258] Court please, this exhibit.

Mr. Goldstein: No objection.

Mr. Kennedy: May we examine it, your Honor?

Mr. Landrum: The Johnson Tract is not on this map?

A. The Johnson Tract is not on that. That shows only a portion of the Boomtown Unit No. 4, and Boomtown Unit No. 5, with Parcel No. 7, extended to its limits beyond Boomtown Unit No. 4.

The Court: Ladies and Gentlemen of the Jury,

(Testimony of Gilbert F. Mellin.)

we will now recess until 2:00 o'clock this afternoon. You will bear in mind the admonition heretofore given you by the Court. You are now excused until 2:00 o'clock.

Mr. Goldstein: Your honor, may we have this map offered in evidence and put on the board before we recess, in order to save time?

The Court: Yes.

(The map referred to was marked Government's Exhibit No. 4 and placed upon the blackboard.)

(Thereupon a recess was taken until 2:00 o'clock P. M., this date.) [259]

Afternoon Session

Wednesday, January 31, 1940

2:00 P. M.

Gilbert F. Mellin on the stand.

(It was stipulated that the jurors were all present.)

The Court: You may proceed, then.

Mr. Goldstein: That map offered in evidence, Mr. Landrum, you haven't questioned the witness about that. [260]

Q. Mr. Mellin, I understood you to say that you first became familiar with or first went upon the lands involved in this action for the purpose of making examination of them in the month of March, 1936, is that correct?

(Testimony of Gilbert F. Mellin.)

A. That is correct.

Q. I will ask you Mr. Mellin, whether or not at the time you first went upon these lands to make an investigation with relation to the purchase of that for this project there was outlined upon these lands the center line of the railroad of the Southern Pacific Railroad?

A. The center line of the relocated railroad was marked on the ground at that time.

Q. And that was March, 1936?

A. That was March, 1936.

Q. And how was it marked?

A. It was marked by stakes driven along the center line at varying distance, marked with stationing indicating distances along the center line of the proposed track.

Q. How close to the property involved in this action was the closest residence at that time?

Mr. Kennedy: May I ask which property you are referring to?

Mr. Landrum: All of them—oh, not the Kin-sella; the property in the Johnson case; how far was it to the closest dwelling?

A. The closest dwelling along the Corum Road was located on the Seamans property about one mile northwesterly of the location of the railroad. South of the railroad were two dwellings in the line along the old Oregon Trail. I offhandedly don't recall—don't recollect the names of those owners, but I believe the closest one was one-quarter of a mile south of the Corum Road. [264]

(Testimony of Gilbert F. Mellin.)

Mr. Stimmel: May I interrupt for one question:

Q. You are talking about the Corum Road only, or the road leading from there when 99 came in?

A. That was commonly known as the Corum Road. It has now been spoken of and designated on the file maps as the Grand Coulee Boulevard.

Mr. Stimmel: Thank you.

Mr. Landrum: Q. What was the condition or the physical characteristics there upon this ground at that time?

Mr. Kennedy: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Landrum: Q. What was there?

A. The greater portion of the land was brush covered. A portion of the Kelly tract—

Q. Now, you are speaking about the Kelly tract. So it will be clear in the record, I want to know what you mean when you talk about the Kelly tract.

A. The Kelly tract is that portion of Boomtown covered by Parcels 4, 5, 6 and 7 in this complaint. It was an ownership consisting of Lots 2, 3 and 4 of Section 30 of Township 33 North, Range 4 West.

Q. Now, go ahead and describe the land.

A. The portion covered by the right-of-way through the Kelly tract was in rolling brush covered hills, the property being steeper toward the north and west and more level toward the south and east. The southerly—or southeastern portion was

(Testimony of Gilbert F. Mellin.)

cleared and relatively flat land. On the Rouge property, which was within Section 25 except for the west half of the northwest quarter, the land was likewise covered with brush, in rolling [265] hills. Part of the Rouge property farther to the west was in open flat.

Mr. Landrum: You may cross examine.

Cross Examination

By Mr. Goldstein: Q. Mr. Mellin, as I understand it, you made the statement to Mr. Landrum that during the time you were working on these particular maps you were working for the Bureau of Reclamation of the Government.

A. That is correct.

Q. When did you commence to work with the Government?

A. April 1, 1936.

Q. April 1, 1936. Then when you stated to the Jury that you had something to do with this project known as the Central Valley Project in 1929, you didn't mean to state that at that time you had any connection with the Federal Government?

A. No, I was working for the State at that time.

Q. As a matter of fact, in 1929 you stated that you did do some work in connection with the Central Valley Project, did you not?

A. Yes.

Q. What did you mean by that? What did you do?

A. I viewed all of the lands in the Sacramento Valley which were susceptible of irrigation from

(Testimony of Gilbert F. Mellin.)

waters of the Central Valley Water Project or any other source in the Sacramento Valley to determine the character of those lands, and the water requirements in order that it might be determined as to whether any water could be transported from the Sacramento River watershed to relieve conditions of drouth that apply in certain areas in the San Joaquin Valley.

Q. Isn't it a fact that was just prior to and preparatory for the election which was held in this state voting upon that very [266] project in 1932, your survey? You recall that, don't you?

A. Yes, it was prior to that. It was in preparation for the laying out of a plan for the project.

Q. And preliminarily your familiarity with this project is one of statewide concern and at a time when the Federal Government had no connection with it; that is true, isn't it?

A. The Federal Government had no connection with it.

Q. Now, after the election in 1932 when the project itself was carried, as it is called, did you then do any further work in connection with any survey that you have testified to here—from 1932 to 1936?

A. I think following 1932 I made a report for the Governor of the State of California relative to the flood control accomplishments of Shasta Dam and the resultant benefits which could be paid for directly by the State and by the Federal Govern-

(Testimony of Gilbert F. Mellin.)

ment recommending that the Army engineers contribute \$12,000,000 to the project, which has since been done.

Q. In other words, your work between 1932 and 1936 again concerned a general survey or the matter of the feasibility of the project coming into being, isn't that true? A. Yes.

Q. So that all of that preliminary work, so to speak, before you went on the ground in 1936 wasn't for the Government, as we refer to it in this action, but for the State of California in your position as an engineer connected with the Bureau of Reclamation?

A. Connected with the State Reclamation Board.

Q. When was this map made, Exhibit 1?

A. That map was made in January, 1940.

Q. Made this month?

A. Made this month.

Q. Then, Mr. Mellin, not in any way minimizing your knowledge or the procedure or with the map itself, it is a fact you didn't prepare the map?

A. It certainly was prepared under my [267] direction. I didn't myself actually draw the lines.

Q. When you say under your supervision, you mean it was prepared in your department?

A. Yes, Sir.

Q. Who prepared the map actually?

A. Draftsmen that work for me.

Q. Was one of those men Mr. Misz, an engineer?

(Testimony of Gilbert F. Mellin.)

A. No.

Q. He wasn't connected with the drawing of the map. This Exhibit 1 is actually the profile, is it not, of the route of the relocated railroad line from Delta to Redding under this proceeding?

A. It is not a profile; it happens to be a plan rather than a profile.

Q. I mean it shows the old road, that shows, as you stated to the Jury, the contour of the Sacramento River, also the American River, also the railroad as it exists now and then the relocated railroad?

A. A plan where these lines would lie on the ground.

Q. And it is your testimony, is it not, that the watershed you have been speaking about, the Shasta Dam, is represented on this Map No. 1 by the green portion you have here, partly?

A. No, that is a lake at its maximum extent beyond Shasta Dam. The watershed extends to Mt. Shasta and the Coast Range and the Sierras.

Q. Yes, but the watershed goes in from the point where the Jury saw the dam operations yesterday, goes in for approximately forty-five miles, doesn't it? That is not the watershed I am speaking of, it is the inundated area I am speaking of.

A. The inundated area is the lake back of the dam. That isn't the watershed. The watershed is that area that comes over the peaks of the mountains to the valley, including the valley.

(Testimony of Gilbert F. Mellin.)

Q. Well, in any event, this map you refer to here shows the right-of-way at the particular points in controversy, is a minor operation of the line itself?

A. It shows the whole [268] right-of-way and then shows the parts under consideration in this suit.

Q. Now, as a matter of fact, in 1936 you didn't give out any information to anyone as to where that relocated railroad was going to be, did you?

A. In 1936 it was certainly available and capable of being seen on the ground.

Q. Was there anything at all in actual existence in 1936 and 1937 upon the part of anyone that they could definitely tell that that relocation of the railroad would run were you have it marked on this Exhibit No. 1, Mr. Mellin?

A. The stakes were on the ground.

Q. How many proposed routes did you have in 1936 for that relocation?

A. It was a true line for a considerable period. They made line changes that moved it to some locality, and some of those they came back to.

Q. You haven't answered my question, Mr. Mellin. I am asking you how many proposed lines you had, different lines in mind?

Mr. Landrum: That is objected to on the ground and for the reason it is not proper cross examination, going into questions far removed from the lands involved in this action. We are concerned here with the lands in the Johnson case and in the Kinsella case, and no other. They are now going

(Testimony of Gilbert F. Mellin.)

into some changes that may have been made far away.

The Court: The witness has testified that route is indicated by certain stakes. Now, the attorney is trying to find out if other lines were contemplated.

Mr. Goldstein: I am going to show that they were.

Mr. Landrum: I trust your Honor understands my objection is that what they did in some other places is immaterial in this action. We are concerned with what they did on this particular [269] land involved here.

Mr. Goldstein: I am going to confine it to them.

The Court: The Court will order it be confined to the land involved in this suit.

Mr. Goldstein: I am willing to do that.

The Court: All right.

Mr. Goldstein: Mr. Mellin, frankly speaking, will you please state again in answer to my direct question how many different proposed lines did you have in connection with the territory under consideration known as Boomtown or through the Kelly tract or through the Rouge tract?

Mr. Landrum: The same objection.

The Court: Objection sustained.

Mr. Landrum: We are not considering Boomtown.

Mr. Goldstein: I have reference to the Kelly tract and the Rouge tract. May I have the question read? Will you read the question, Mr. Reporter.

(Testimony of Gilbert F. Mellin.)

(The question was read by the reporter.)

Mr. Hjelm: It includes Boomtown as a whole.

Mr. Goldstein: I will withdraw the question for the moment. I will reframe it, if your Honor please.

Q. Directing your attention to the portion marked with the red chalk there, it has reference, I take it, as you stated on direct examination, to the Kelly tract and the Rouge tract: I will ask you now in connection with that property in that locality how many different proposed lines did you have under consideration in 1936 and 1937?

The Court: Indicated by stakes?

Mr. Goldstein: Q. Indicated by stakes or anything else.

A. There were several lines run through those properties, but all of the railroad lines did run through the Rouge ownership and [270] Kelly ownership.

Q. But there was more than one line proposed through those tracts under consideration, was there not? A. Yes.

Q. How many were there?

A. I am not informed as to the number. I know of the ones that I saw.

Q. How many did you see? A. Two.

Q. Isn't it a fact, Mr. Mellin, there were actually four under consideration—four different proposed lines through that particular property?

A. I know of no such fact as that. I saw two.

(Testimony of Gilbert F. Mellin.)

Q. Now, in connection with those two you saw, Mr. Mellin, you have on that map the actual re-located route and line shown by the yellow line here, that is correct, isn't it?

A. As now relocated?

Q. How far away from that can you tell the Jury was the second one that you saw or know anything about?

A. If I could have Exhibits 3 and 4 I could locate that line approximately on them—2 or 3, I think.

Q. 2 or 3?

Mr. Hjelm: 3 or 4.

Mr. Goldstein: Here is 3. Here is Exhibit 3, which relates to the Rouge tract, I believe, that you testified to, and No. 4—

The Clerk: 2, he said.

The Witness: 2.

Mr. Goldstein: Q. What did you say, 2 and 3?

The Witness: Yes.

Q. Let us put up 2, then. Exhibit No. 2 is this one which runs through the Kelly tract?

A. Yes.

Q. This is, in other words, Parcel No. 7?

A. Parcels 4, 5 and 7.

Q. 4, 5 and 7; you show all of those. Now, you say by referring to this exhibit you can state to the Jury where the other line [271] was you know about.

Mr. Landrum: Just a moment. Can you say

(Testimony of Gilbert F. Mellin.)

what line you are referring to, the center line, or the line to one side of it, or what?

Mr. Goldstein: Marking the center of it.

A. In 1936 the line of the railroad crossed through the Rouge property so that 11 acres were involved in the right-of-way itself, and 9 acres in the triangular piece to the south of the right-of-way. It crossed Grand Coulee Boulevard at a point farther to the west than the present crossing and continued further into the Kelly property to the north, but close to the present alignment.

Q. Is that what you call the L. Line?

A. I don't know the nomenclature of the line.

Q. Did you ever hear the expression of the L. Line proposed there?

A. I heard of expressions P. K. lines and many others. I don't recollect any particular one of them was called L. It may have.

Q. What do you call this line I refer to in Exhibit No. 1, Mr. Mellin?

A. The line on Exhibit No. 1 is the relocation.

Q. Are there any initials to it?

A. There are no initials to it.

Q. Did you ever see any reference made to the C Line? A. Yes.

Q. What is meant by the C Line in connection with this particular locality?

A. The C Line was a relocation at a reduced elevation from one which had previously been made, due to the fact that Shasta Dam was to be built, and not another dam.

(Testimony of Gilbert F. Mellin.)

Q. Well, then, the C Line was one in addition to the line you have just been speaking about, which you have designated on the map here?

A. If the C Line is the present railroad—and I believe it is—it is now the relocated line. [272]

Q. Was there any time at all in 1936 or 1937 that your department ever issued any public statement or any document of any kind or character that you could bring before this Jury showing the relocation of this railroad would be where it is now on Exhibit 1?

Mr. Landrum: That is objected to on the ground it is incompetent, irrelevant and immaterial, not proper cross examination, and not binding on the United States.

The Court: Sustained,—Did you wish to be heard?

Mr. Goldstein: Yes, your Honor, I would like to be heard. I claim this is part of the cross examination because Mr. Landrum asked this witness directly as to what his connection was with the property and what the nature of the property was in 1936.

(Argument.)

The Court: The objection is sustained. Proceed.

Mr. Goldstein: Mr. Mellin, are you familiar with a map issued on the twenty-fourth of September, 1937, from your department, showing the relocation of that line?

A. I can't state as to that.

(Testimony of Gilbert F. Mellin.)

Q. What is it? A. I can't state as to that.

Q. Let me show you a map issued by the Department of the Interior, Bureau of Reclamation, Central Valley Project, California, C Line, Shasta Dam, and dated Redding, California, 9-24-37, and I will ask you, Sir, if you have ever seen that map before.

A. I cannot say definitely whether I have seen copies of this map before or not. I have seen many maps of the railroad relocation looking similar, but whether I have seen this one I am not certain. [273]

Q. You are not familiar with that particular map? Will you take a look at it, please, and see the relocated—wherein the Southern Pacific Railroad in connection with the Kelly tract and Rouge tract, what it provides? It is your map, isn't it, your department?

A. No, not in my department.

Q. What department is it from?

A. This is from the Redding office. This is made in Redding.

Q. Yes, but it is the Department of the Interior—

A. Yes.

Q. Continuing: Bureau of Reclamation—

A. No, U. S. Bureau of Reclamation. This is Drawing 332 of Size C. That had been made up there—

Q. Line C, isn't it?

A. Size C.

Q. Oh?

A. I am speaking about the big C down here.
(Indicating)

(Testimony of Gilbert F. Mellin.)

Q. Mr. Mellin, let me understand you; am I to understand you are not familiar with this map I have just exhibited to you?

A. I don't know whether I am familiar with this map or not. I have looked at hundreds of maps. This doesn't happen to be the map that was used in the appraisal of the properties. It has an appearance of a railroad located on the Rouge property at the location where the right-of-way is now to be taken, but it has different lines for railroad right-of-way on other parts of it. I don't know whether I am familiar with or have been subjected to this particular map before or not.

Q. Let me ask you, do you know George Pearl, who was County Surveyor and Engineer of Shasta County in 1936, 1937 and 1938?

A. Yes, I know Mr. Pearl.

Q. Did you ever discuss that map with Mr. Pearl?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, no foundation laid, not binding on the United States, hearsay, and not proper cross examination. [274]

Mr. Goldstein: If your Honor please, I can't prove it all together. I am going to offer the copy in evidence later on; but I think on his statement—

Mr. Hjelm: That is his guess.

Mr. Goldstein: Just a minute; pardon me, Mr. Hjelm. On Mr. Mellin's statement that in 1936 these stakes were in certain places on the territory there,

(Testimony of Gilbert F. Mellin.)

on the ground there, I have a right to certainly question him from the maps of the Bureau of Reclamation itself, which we will connect up, tie up as having been given to the engineer in charge of this work.

Mr. Landrum: If the Court please, he is talking about a conversation between a man—between Pearl and someone else. That certainly would not be binding on the Government.

Mr. Goldstein: I said, "Did you have a conversation?" The answer to that is yes or no; that doesn't call for any conversation.

The Court: Objection sustained.

Mr. Goldstein: Q. Mr. Mellin, have you any map that you could produce here in connection with the relocation of that railroad in 1936 or 1937 as the right-of-way agent for the Government in this matter?

A. I have none here that I can produce.

Q. Where have you got it?

A. In my office.

Q. Can you produce that tomorrow, any such map?

A. Yes. If you will designate what particular kind of map, I will bring a map of the right-of-way across the Rouge tract and the right-of-way across the Kelly tract.

Q. Yes, that is the very thing I am requesting, if you have any map at all showing the relocation of that railroad in 1936 or 1937 through Parcels 1,

(Testimony of Gilbert F. Mellin.)

4, 5, 6 and 7 you have been speaking about today.

[275]

Mr. Hjelm: You mean in harmony with those stakes?

Mr. Goldstein: Yes; that is what I have reference to. You will produce those maps? A. Yes.

Q. Very well. Now, let me go further: Are you familiar at all with when the work first commenced in that vicinity in connection with this railroad? I am speaking of these tracts only.

Mr. Hjelm: What kind of work?

Mr. Landrum: What kind of work?

Mr. Goldstein: Any kind of work.

A. I know that work started in connection with these tracts in 1936, if not in 1935, because these stakes had been in the ground when I got there.

Q. I was just going to ask you what you have reference to when you say work commenced; you mean stakes in the ground? A. Yes.

Q. Through the brush, you mean?

A. Cutting a line through the brush so that surveys could be made.

Q. How far apart were the stakes?

A. No more than a hundred feet.

Q. The stakes you are referring to now and to which you testified on direct examination you saw, was the center line of the probable relocation of the railroad? A. Yes.

Q. You have included in your statement that work was being done in 1936 the statement of a survey being made at that time—

(Testimony of Gilbert F. Mellin.)

A. There was certainly plenty of evidence of it——

Q. I didn't ask about the evidence.

A. I should say it was made in 1936; it may have been made in the fall of 1935.

Q. Who made it?

A. I don't know. The Bureau of Reclamation, because——

Q. How do you know it was made?

A. Because they sent me to go [276] out there and look at it.

Q. In other words, it was made by someone else and then you checked on it, is that what you mean?

A. I didn't do any surveying at all. I went there in March to look over it and see whether I wanted to take over the job of right-of-way agent, and on April 1 I came up there in the employ of the Bureau of Reclamation and went over this property more in 1936.

Q. Mr. Mellin, would you mind explaining a little bit more as to what your duties as right-of-way agent for the Bureau of Reclamation were?

A. At the inception it was considered that my work would comprise the making of records for appraisal of right-of-way.

Q. Is that all?

A. That was going to be all at the start.

Q. Did you ever have anything to do with buying——

Mr. Landrum: Just a moment. Let the witness finish his answer.

(Testimony of Gilbert F. Mellin.)

Mr. Goldstein: Pardon me. I didn't intend to shut him off. .

Mr. Landrum: Go ahead.

A. At that time the State of California and the United States were working on a cooperative agreement, and it was considered that the State of California could, probably buy that land better than the United States. It developed that it was desired that the United States, through the Bureau of Reclamation, also buy the land.

Mr. Goldstein: Q. Did you have any connection with the buying up of the right-of-way along the lines you have just indicated?

A. I have been in charge of it.

Q. Now, will you please answer this question: Will you please tell the Jury when was the first time you first began buying any rights-of-way in this particular Rouge tract and Kelly tract now [277] under consideration?

A. The first tract that was bought out of the Rouge tract was bought on November 5, 1937. Bought.

Q. November 5, 1937?

The Court: Mr. Goldstein, it is now 3:00 o'clock. We will take the usual recess. Remember the admonition heretofore given you by the Court, while you are out in the corridors. You may now retire.

(Thereupon a ten minute recess was taken, at the conclusion of which it was stipulated by counsel

(Testimony of Gilbert F. Mellin.)

for the respective parties that the jurors were present in the jury box.)

(The last question and answer were read by the reporter.)

Mr. Goldstein: Q. Mr. Mellin, aren't you mistaken about that? Isn't it a fact that the purchase you have reference to is the purchase of the tract of land known as the Seaman tract about a mile away from this locality, and was bought for the purpose of a septic tank for Government City?

A. No, the purchase I referred to is a purchase from Albert Rouge—was a purchase of twenty acres, and at the same time, for \$100.00, I got an option for the right-of-way of the railroad at its present location.

Q. You say that was in November of 1937?

A. Yes, Sir.

Q. Isn't it a fact that this particular parcel of land you are speaking about is approximately a mile from the location as it appears on Exhibit No. 4, showing the Kelly tract—I think this is Exhibit No. 4—Exhibit No. 2, showing the Kelly tract and also a portion of the—

A. May I come over, please?

Q. Pardon me?

A. May I come over there, please?

Q. Yes. Take the Rouge tract here, Exhibit No. 3. Will you [278] point out now where you claim that you made that purchase in November of 1937?

A. The purchase is outlined in red, the option is outlined in green.

(Testimony of Gilbert F. Mellin.)

Q. Will you mark this, "purchase", please?

Mr. Hjelm: November, 1937, purchase.

Mr. Goldstein: Q. Purchased November, 1937.

(Witness marks on the exhibit.)

Mr. Hjelm: "Option" on the other.

Mr. Goldstein: Q. In this Parcel 1 are 3.17 acres you have reference to?

A. Two acres at that time.

Q. Two acres at that time. Please mark that two acres, "option, November, 1937".

(The witness marks on the exhibit.)

Q. You may have a seat now. In order to definitely tie your testimony in with the gentleman you referred to, I am going to ask Mr. Rouge to identify himself. Is Mr. Rouge in the courtroom? Mr. Rouge, will you please stand up? Is that the gentleman you refer to?

A. That is Albert Rouge. I personally didn't make the purchase. It was made under my direction.

Q. You didn't make the purchase. Now, I have to start all over again. A. I didn't—

Q. Pardon me, Mr. Mellin, I am asking you to testify before the Jury what you yourself know and what you yourself have done.

A. I certainly did know that that was done, because I directed that it be done.

Q. Mr. Mellin, will you please answer this question: Did you yourself buy any right-of-way for the relocated railroad in the vicinity of the Kelly tract or Rouge tract in November, 1937? [279]

(Testimony of Gilbert F. Mellin.)

A. It was bought under my direction.

Q. Who did? Who bought it?

A. I believe it was Mr. Snell and Mr. Stafford that were directed by me to endeavor to buy twenty acres and obtain an option from Mr. Rouge.

Q. Let us identify these parties now, Mr. Mellin. Mr. Snell was the resident engineer of the Bureau of Reclamation in charge of operations up there, wasn't he? A. Yes.

Q. And Mr. Stafford was a civil engineer supplied from the State of California in the Bureau of Reclamation— A. Decidedly no.

Q. Was he connected with the—

A. He is the right-of-way agent that worked for me, reports directly to me.

Q. I am willing to stand corrected. Mr. Stafford then was working in your bureau under you?

A. Under my direction.

Q. Then it is your positive testimony, Mr. Mellin, that this right-of-way—you obtained an option from Mr. Rouge in November, 1937, for that right-of-way?

A. Either Mr. Snell or Mr. Stafford under my direction.

Q. Isn't this true: that the first right-of-way purchased in the vicinity I have reference to, in Boomtown or the Kelly tract or the Rouge tract, commenced in August, 1938?

A. I am certain that I put a man up in the

(Testimony of Gilbert F. Mellin.)

field there to do that work quite some time before then.

Q. All right, Mr. Mellin. Can you testify before this jury now or name any single transaction where any right of way was purchased in the Kelly tract or in the Rouge tract, in Unit 2, Unit 5 or Unit 9 of Boomtown, before August, 1938?

A. Yes, a twenty acre tract was purchased prior to that. [280].

Q. The twenty acre tract is right behind Government City, isn't it? It is almost a part of Government City?

A. It is a part.

Q. That is not the right-of way?

A. An option was obtained for the two acres in the southeast corner.

Q. When you refer to the twenty acre tract, Mr. Mellin, do you refer to that in the form of a railroad right-of-way or a part of the improvements of Government City?

A. It was for use in connection with Government City.

Q. All right; that is definite. Now, the only thing we have left in connection with your testimony is that this option that you refer to in the Rouge tract, two acres, was obtained either by Mr. Stafford or Mr. Snell in November, 1937?

A. Yes, Sir.

Q. Was it ever exercised?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

(Testimony of Gilbert F. Mellin.)

(Argument)

The Court: Objection sustained.

Mr. Goldstein: Q. Well, Mr. Mellin, do you know Mr. Miller or Mr. Humphrey?

A. Yes, I know both Mr. Miller and Mr. Humphrey.

Q. Do you know Mr. McConnell?

A. I am certain I know Mr. McConnell.

Q. During the time you were highway agent for the Bureau of Reclamation, you knew that they were owners of that particular property in this vicinity that was sought to be condemned, did you not?

A. They weren't the owners during all of that time.

Q. Were they during a portion of the time?

A. During a portion of the time, yes. [281]

Q. Did you ever at any time give them any map or any project or projection showing the relocation of the railroad to where it appears on Exhibit No. 1 here of the Government's, as owners of the property?

A. I don't believe I myself ever contacted them until after this suit was filed.

Q. In other words, the first connection you have had with the actual owners of the property—

A. Myself.

Q. —then was subsequent to the filing of this action in November, 1938?

A. I believe it was. [282]

GEORGE L. PEARL,

called for the Defendants, Sworn.

The Clerk: Will you please state your name to the Court and Jury? A. George L. Pearl.

Direct Examination

By Mr. Goldstein:

Q. Please state your full name.

A. George L. Pearl.

Q. Turn around and face the Jury there, Mr. Pearl. Where do you reside, Mr. Pearl?

A. In Redding, Shasta County.

Q. How long have you resided there?

A. Eleven years.

Q. What is your business or occupation?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. Eleven years.

Q. Where did you graduate from?

A. I am not a graduate engineer.

Q. Where did you receive your education?

A. Practical experience, self education.

Q. And did you qualify after obtaining experience as a civil engineer? A. Yes.

Q. You have a license as such?

A. I have, yes.

Q. Did you hold any official position in Shasta County during the years of 1936, 1937 and 1938?

A. I was County Engineer and Surveyor.

Q. How long were you such County Engineer and Surveyor?

(Testimony of George L. Pearl.)

A. Four years, from January, 1935, to January, 1939.

Q. Have you had practical experience in making surveys and laying out lines for various surveys for different projects, making plats, maps and drawings? A. I have, yes.

Q. Are you familiar with the territory in and about Shasta County, particularly referred to here as Boomtown and those tracts referred to by Government counsel? [285]

A. Yes, I am familiar with them.

Q. How long have you been familiar with all that property? A. Since 1930.

Mr. Landrum: Pardon me, did you say 1930?

A. Since 1930; for the last ten years.

Mr. Goldstein: Q. About ten years?

A. Yes.

Q. I will ask you whether or not you know Mr. Victor Miller, Mr. John J. Humphrey, Sr., and Mr. Charles J. McConnell.

A. Yes, I know all three of them.

Q. You also know Mr. Albert Rouge?

A. Yes.

Q. You also know Mr. Elmer Johnson?

A. Yes.

Q. You also know Mr. Lee Kronschnabel?

A. Yes.

Q. Were you employed by these various persons in or around the years 1937, 1938 and 1939 in con-

(Testimony of George L. Pearl.)

nection with the property owned by them in that vicinity, the subject of this action?

A. Yes, I was.

Q. I first call your attention to what has been referred to here as Parcel No. 1, known as the Rouge tract: are you familiar with that tract and were you familiar with it in the month of December, 1938, and for some time prior thereto?

A. Yes.

Q. Did you originally lay out the subdivision for that tract? A. I did, yes.

Q. And was there a map filed as of record in Shasta County in regard to that subdivision?

A. In regard to the subdivision of the Rouge tract?

Q. In regard to the subdivision of the Rouge tract. A. There was a map filed, yes.

Q. Was a map filed of the Subdivision No. 4 that is shown on Government's Exhibit Map No. 4 here, known as the Kelly tract?

A. Yes, there is a record map filed of that. [286]

Q. Now, in order to demonstrate the exact location of the property in question, I will ask you whether or not at the request of these owners you prepared certain large maps showing these various parcels of land in controversy here, according to the acreage and location, directly in connection with the right-of-way of the railroad company?

A. I did prepare such a map.

(Testimony of George L. Pearl.)

Q. I show you Parcel No. 1—the Rouge tract—
(showing map to counsel)

Mr. Landrum: Could I ask the engineer to
examine it?

Mr. Goldstein: It is the shaded portion. Q. Will
you come to the blackboard—

Mr. Landrum: Just a moment, if the Court
please. I am going to object to any exhibiting of
this map to the Jury until it is offered in evidence
and we have had an opportunity to object to it.

Mr. Goldstein: All right. Q. I am going to
ask you, Mr. Pearl, to state just how you made this
particular plat or map that I hold here with ref-
erence to Parcel No. 1.

A. It was made from the recorded map at an
enlarged scale and is a duplicate twice the size of
the recorded map.

Q. The recorded map is in the Recorder's Office
of Shasta County? A. That is right.

Q. This shaded portion you have here, is that
the actual portion of the property to be taken under
the condemnation proceedings?

A. That doesn't show all of Parcel 1. There is
46/100 of an acre that is shown on another map.

Q. Well, this shows the property in connection
with Mr. Lee Khronschnabel, doesn't it?

A. Yes.

Q. In other words, this particular map is di-
rected solely to the property standing of record in
the name of Lee Kronschnabel? [287]

(Testimony of George L. Pearl.)

A. And I believe Van Santen.

Q. And Van Santen, a small piece there. Now, there is another part on Parcel No. 1 you have another projection of? A. Yes, I have.

Mr. Goldstein: I guess that is what you have reference to, Counsel.

Mr. Landrum: Yes.

Mr. Goldstein: Q. You have another map. Now, this plat, Mr. Pearl, concerns solely the two property owners, Mrs. Van Santen, with reference to a small piece in the corner, and the balance of 3.11 acres owned by Mr. Lee Kronschnabel and his associates? A. That is true.

Mr. Goldstein: Now, if the Court please, I offer this map for the purposes of identification of the particular property and having the witness explain what the exact location is.

Mr. Landrum: As I understand it, Mr. Pearl—

Mr. Goldstein: You can ask him questions.

Mr. Landrum: May I ask a question?

Mr. Goldstein: Go right ahead.

Mr. Landrum: Q. As I understand it, Mr. Pearl, you don't contend that this exhibit covers all of Parcel 1, do you? A. No.

Q. You have left a part of it off, have you not?

A. Deliberately, yes.

Q. Deliberately? A. Yes.

Q. Why? A. I have another map.

Q. Then you were making two maps for one parcel, isn't that correct?

(Testimony of George L. Pearl.)

A. That is true, but two different owners.

Q. That is the reason for leaving it off?

A. Yes.

Mr. Landrum: All right. [288]

Thursday, February 1, 1940. 10 o'clock A. M.

(It was stipulated by counsel for the respective parties that the jurors were present in the jury box. George Pearl on the Stand.)

Direct Examination,
Continued:

Mr. Goldstein: Q. Mr. Pearl, the Department of Reclamation here very kindly handed you three certified copies of maps filed in the office of the County Recorder of Shasta County, prepared by yourself as County Engineer and Surveyor. I hold those in my hand. You have examined those before?

A. Yes, I have.

Mr. Goldstein: I believe Counsel are familiar with these maps.

Q. I have here Unit No. 4 of Boomtown, Unit No. 5 and Unit No. 7.

A. Unit No. 2 and 9.

Q. Unit No. 9. A. No. 2 also.

Q. And No. 2, Unit No. 4, No. 2, No. 5 and No. 9. Now, these copies were prepared by yourself, were they? A. The original of—

Q. The original of all these maps?

A. Yes.

(Testimony of George L. Pearl.)

Mr. Landrum: If the Court please, we will stipulate they may be put in evidence without any further testimony. If you will offer these and put them in we will stipulate they may go in.

Mr. Goldstein: We offer these as one exhibit. There are four,—Unit 2, 4, 5 and 9.

(The maps referred to were marked collectively as Defendant's Exhibit "A".)

Mr. Goldstein: Q. Now, calling your attention to the map I asked you about yesterday afternoon, in connection with Parcel No. 1: You prepared from this map, did you, two separate diagrams, one shows the shaded portion of this map, and another one which shows the [293] Rouge property or the property owned by Mr. Rouge? A. Yes.

Q. This is the property exclusively owned by Lee Kronschnabel, Victor Miller and J. J. Humphrey?

A. And Mrs. Van Santen, with a small parcel.

Q. For the further clarification of this map, this is made according to the scale, is it not, except a larger size, from the original map?

A. It is just about twice of the filed copy.

Q. Twice the size of the map filed in the office of the Recorder which has just been introduced in evidence as Exhibit A? A. That is true.

Mr. Goldstein: We offer this in evidence and ask it be marked Defendant's Exhibit "B".

Mr. Landrum: No objection.

The Court: Admitted.

(Testimony of George L. Pearl.)

(The map referred to was marked Defendant's Exhibit "B").

Mr. Goldstein: Q. Now, Mr. Pearl, will you please just step down here for a minute. In order to understand a little clearer, will you please explain just exactly what this shaded portion shows in connection with the Rouge tract or Unit No. 5.

A. The parcel colored in red is the area that the Bureau of Reclamation proposes to take as right-of-way for the railroad relocation, and is the Parcel No. 1 the jury viewed in Shasta County day before yesterday.

Q. Which part of this is the Van Santen property?

A. This long strip running from the southerly boundary of Grand Coulee Boulevard.

Q. You have a line there, I notice.

A. Yes, approximately 109 feet—109 feet and a fraction. It contains, I believe, 2/100ths of an acre. [294]

Q. This is the right-of-way here of the Southern Pacific Company, marked "Kronschnabel", the underpass right here, the shaded portion, is over that road where the jury was day before yesterday?

A. The underpass is in the center of this 200 strip down on the map as Grand Coulee Boulevard.

Q. What is the width of the Grand Coulee Boulevard as shown on the map and also as it appears on the premises now, the width of the street itself?

(Testimony of George L. Pearl.)

A. Grand Coulee Boulevard is 60 feet wide.

Q. What is the width of the underpass put in there?

A. I believe twenty-six feet.

Q. The map itself is drawn to what scale, Mr. Pearl?

A. One inch equals fifty feet.

Q. Now at the time this map was filed, had there been any other reservation made in this particular locality as to a strip of 200 feet as shown on your map—I would rather have you explain that first of all. What was the reservation of this map you filed in connection with the right-of-way of the Southern Pacific Company?

A. The filed copy shows a reservation of 200 feet up to this point that I am pointing to, up to Chico Street, practically, and there it flares to a width of 300 feet.

The Court: Q. What do you mean by reservation, reservation for what?

Mr. Landrum: Railroad, your Honor.

The Court: I thought the Jury should know that.

Mr. Landrum: The property to be reserved at the time this map was made. In other words, when they platted it on this plat, they showed the railroad.

Mr. Goldstein: We aren't denying that, Mr. Landrum. [295]

Q. You say it was 200 feet?

A. That is true.

Q. Did anyone ask you to make that reservation?

(Testimony of George L. Pearl.)

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial who asked him to do it. He has made a plat of the ground at that time, and this is his plat, and it is recorded.

Mr. Goldstein: That is true, but we are entitled to show it was the Bureau of Reclamation who asked him to do it, asked him to make the reservation. We certainly are entitled to show that fact. That is the reason it was done, these owners weren't—

The Court: It seems to be immaterial; objection sustained.

Mr. Goldstein: Your Honor holds it is immaterial? I don't know how else we can make it clear to the jury—

Mr. Landrum: If your Honor please, if it is immaterial, he shouldn't make it clear to the Jury.

Mr. Goldstein: Q. Mr. Pearl, how did you come to make that reservation?

Mr. Landrum: That is objected to on the same ground. This is a recorded plat, your Honor, recorded in the office of the Register of Titles or whatever it is called. It speaks for itself. The reason he made it is **immaterial**.

(Argument).

The Court: Objection is sustained.

Mr. Goldstein: Q. Mr. Pearl, this particular portion that you have here—I notice you have a line running from the northwest corner of Main

(Testimony of George L. Pearl.)

Street clear down to the edge of the map. Does that designate anything at all on the map itself?

A. From the northeasterly corner-running south-westerly is a line that at the time of the filing of the map was considered to be the edge of the railroad right-of-way. [296]

Mr. Landrum: By you. A. Yes.

Mr. Goldstein: Q. Now, what is the distance between that line to the place now where the plaintiff is condemning the land? A. Fifty feet.

Q. Fifty feet, and that also goes on the other side of this property referred to here as the corner of Section 25?

A. In this case they are taking the entire southeast corner, southeasterly of their westerly right-of-way.

Q. Now, in order to tie this in and in order to show the territory up here, I will refer you now to the next map and ask you whether or not you made an enlargement of Unit No. 4 just immediately north of the Grand Coulee Boulevard and which is the unit lying right in that territory.

(Displaying map to counsel.)

Mr. Goldstein: Your Honor, we offer in evidence—the witness identified as having made this enlargement from the original map of Unit No. 4 on file——

The Witness: Unit No. 4, 9 and 2.

Q. 4, 9 and 2, those were the other two maps which were offered in evidence..

(Testimony of George L. Pearl.)

A. That is true.

Mr. Goldstein: We offer this in evidence, your Honor.

Mr. Landrum: No objection, your Honor.

The Court: Received.

(The map referred to was marked Defendant's Exhibit "C" and placed on the blackboard.) [297]

Q. When was Unit No. 4—the map itself offered here—filed as of record?

Mr. Landrum: That is objected to, it speaks for itself.

Mr. Goldstein: That is a preliminary question. I think it does, but in order that—

Mr. Landrum: 1938.

Mr. Goldstein: I notice here it was filed in March 1938.

A. I believe it was filed in May of 1938, May sixteenth. The map was completed in March, but it wasn't filed for record until May.

Q. Oh yes, accepted for record and recorded Book 5 Maps, page 3, on the sixteenth day of May, 1938 at 12:26 P. M. This was recorded then on the sixteenth of May, 1938, and then you had a 200 foot strip there on the map reserved, is that correct?

A. That is true.

Q. Up to that point you have a street there as being Red Bluff [298] Street.

A. No, Chico Street.

Q. Chico Street. Now, the total area of this Unit No. 4 as shown here, including the fifty feet on each side up to Chico Street is how much?

(Testimony of George L. Pearl.)

A. That is the area that is proposed to be taken. It is 10.16 acres. [299]

The Court: Read the question, Mr. Reporter.

(The reporter read the question as follows: Mr. Pearl, will you please explain just exactly what this map shows in connection with those streets, as to whether or not they are through streets or not?)

A. As they appear on this map they are not through street.

Mr. Goldstein: Q. Are there any of these strips shown on this subdivision Unit No. 4, Main Street, Chico Street, Red Bluff Street, or any of these at all that appear on the map as through streets?

A. No. [301]

Q. In order there will be no misunderstanding, will you please explain to the Court and the Jury just what the territory is, that this section is that is east of the east line of the right-of-way of the Southern Pacific property?

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, going far, far afield from the land involved in this action.

(Argument).

Mr. Landrum: Let him go ahead and point it out.

Mr. Goldstein: Q. What is the general character of the territory lying immediately east to 99 E., or rather Highway 99?

A. Easterly to Highway 99 it is generally improved and built up in small homes, and some busi-

(Testimony of George L. Pearl.)

ness—quite closely connected through the first quarter of a mile, and beyond that occasional business places.

Q. How many subdivisions, if there are any subdivisions, east of this point are there to 99 that you know about? A. Five, I believe.

Q. Five? A. Yes.

Q. Can you give this jury any idea as to the character of the boulevard itself right to 99 E and the traffic as it existed in December 1938 and prior to that time?

A. Of course, there is considerable traffic on that road. At times when they are changing shifts at the dam and they are commuting back and forth, it is very congested.

Mr. Landrum: That is, workers of the dam coming through there?

Mr. Goldstein: Yes, and tourists also.

The Court: Now, the witness spoke about businesses. Will you [308] explain to the jury the nature of the businesses so the jury can draw their conclusion.

Mr. Landrum: May I ask further, your Honor, that he be more definite with relation to the particular location of those businesses, whether he is talking about the place where the jury went in and got a Coca Cola—Is that one of the businesses you are referring to?

A. That is one of the businesses, but not only that,—that lies west of the underpass; I had in

(Testimony of George L. Pearl.)

mind particularly the area easterly from the underpass.

Mr. Goldstein: Q. Now, will you answer his Honor's question as to the type of businesses and types of homes and just what they consist of? That is, the entire area there.

Mr. Landrum: May I have a further objection, your Honor, that it is not definite as to time. If the witness be confined prior to the taking in this action, I have no objection.

Mr. Goldstein: I asked prior to December, 1938.

The Court: Q. You have that in mind, Mr. Pearl?

A. Yes. Practically every type of business in this first quarter of a mile: Eating houses, furniture stores, second hand stores, beer parlors, entertainment businesses, fruit markets, produce markets, garages.

Mr. Goldstein: Q. Are you familiar with another theatre site located about a half mile east of this subdivision?

Mr. Landrum: That is objected to on the ground and for the reason that we are not interested in a theatre site. The question includes the conclusion of counsel that it is a theatre site. If there is a theatre there, that is another thing.

Mr. Goldstein: I will withdraw the question. I think the objection [309] is probably good.

The Court: It is rather prospective.

Mr. Goldstein: I will put it in this form, Mr.

(Testimony of George L. Pearl.)

Pearl: What is the distance between the point of the underpass and 99—this territory I have just asked you about and that you are just testifying about.

A. I believe it is about a mile and a half to a mile and three-quarters.

Q. Generally speaking, on December 14, 1938, and prior to that time, say during that year, what can you say as to the general condition as to whether it was or was not built up for business and residential purposes?

A. I would say that as of November, 1938, that the buildings are practically as it is now.

Q. And that included the various lines you have testified to before the Jury, also the matter of subdivisions, about five subdivisions?

A. Yes.

Q. Now, in order to get that more concretely, can you give the Jury some idea of how many acres those five subdivisions cover that you know about yourself, personally?

A. I can't offhand—

Q. Did it cover the entire section over that mile and a half or mile and three-quarters?

A. Yes.

Q. Now, to get this definitely before the Jury: What is the distance from the point of the underpass to Government City the Jury viewed on Tuesday morning?

A. About a mile—just under a mile.

Q. What is the distance from that same point

(Testimony of George L. Pearl.)

to the Shasta Dam project itself by automobile on Grand Coulee Boulevard and going up to the highway to turn right there at the dam? [310]

A. I don't know for certain, but my estimate would be four miles.

Q. Approximately four miles. I think Mr. Mellin testified yesterday by air line it was about three miles and by road it probably would go four miles. Now, in connection with these various subdivisions on this map C—Unit No. 4, this is No. 9, and here you have Boomtown Unit No. 2—were those subdivisions laid out by you? A. Yes, they were.

Q. Were all of these subdivisions, in fact—Unit 5 also included—laid out by you?

A. All of the ten units of Boomtown were laid out by me.

Q. All of the ten units? A. Yes, Sir.

[311]

Q. At whose request did you prepare this map as it appears in Unit No. 4, marked Exhibit A?

A. The map was prepared at the request of Miller, Humphrey and Charles McConnell and the Bureau of Reclamation in the shape it is now.

Q. Let me ask you in connection with that—By the way, where was the office of the Bureau of Reclamation in connection with your office?

A. Just across the court from the County Engineer's Office of Shasta County.

Q. What do you mean by that? How far away was it?

(Testimony of George L. Pearl.)

A. Probably the two offices were separated by a hundred or a hundred and fifty feet.

Q. Their offices were close to your office?

A. Yes. [312]

Q. Mr. Pearl, I show you another map of Shasta Dam and ask you where did you get that?

A. This was handed me by Mr. Misz, the locating engineer of the railroad for the Bureau of Reclamation.

Q. When was that handed you?

A. About October 1.

Mr. Hjelm: Q. What year?

Mr. Goldstein. Q. What year? A. 1937.

Q. October 1, 1937. And where was it handed to you?

A. In the City of Redding. In the City of Redding in my office.

Q. During the time you were platting out these various subdivisions of Boomtown? A. Yes.

[313]

Mr. Goldstein: If the Court please, I am offering it for identification, regardless of the objection. The objection is really properly made when it is offered as an exhibit in the case. I am only offering this for the purpose of identification, and later on, after certain testimony I am going to introduce. I will offer it in evidence. For that reason I ask it be marked Exhibit D for identification.

The Court: For that limited purpose it may be admitted.

(Testimony of George L. Pearl.)

(The map referred to was marked Defendants' Exhibit "D" for identification.) [314]

Mr. Stimmel: Q. Mr. Pearl, you prepared this map? A. Yes, I did.

Mr. Stimmel: We offer this as next exhibit in the line of defendants, your Honor.

Mr. Landrum: Could I ask the witness just one question with relation to the foundation?

Q. Mr. Pearl, does that map properly depict the conditions as they existed on the ground on the fourteenth day of December, 1938?

A. Yes, they do.

Mr. Landrum: No objection.

The Court: Admitted.

(The map referred to was marked Defendants' Exhibit "E".)

Mr. Stimmel: Q. Mr. Pearl, will you come down here: Will you point out to the Jury, please, Mr. Pearl, what the different colored portions of that map represent and the quantity of area in each colored portion?

A. This area shown in red is the portion on the relocated Southern Pacific right-of-way, and is 46/100ths of an acre in area. The parcel shown in blue is 54/100ths of an acre and represents a strip 40 feet wide and is 18 feet long.

Q. Mr. Pearl, will you point out to the Jury where Main Street intersects the right-of-way of the Southern Pacific Railroad?

A. On the west or east?

(Testimony of George L. Pearl.)

Q. On the west.

A. On the west—it would be right at that—the separation between the blue and the red color.

Q. And in squaring, if you square this triangular portion in red, what rectangular would it make, what dimensions of a rectangle would it make?

Mr. Landrum: That is objected to on the ground and for the [316] reason it is incompetent, irrelevant and immaterial.

Mr. Stimmel: It is only for the purpose of helping the Jury to understand the size of the area up here. In other words it is 81 feet this way, and it is about 40 feet this way—

Mr. Landrum: Mr. Stimmel, let him give that. Now, you are testifying—

The Court: He can state what the dimensions are.

A. The dimensions are 40 feet in width, 81.78 feet on the east line, and 21.4 feet on the westerly line.

Mr. Stimmel: Q. Is there any street immediately abutting the property in the blue color and the red color?

Mr. Landrum: As of what date?

Mr. Stimmel: Q. As of December 14, 1938.

A. North Boulevard in Boomtown Unit No. 4 abuts that property.

Q. And is that North Boulevard (indicating)?

A. Yes.

Q. Did that abut against the property on the

(Testimony of George L. Pearl.)

easterly side of the entire portion of lots in color?

A. Yes.

Q. Now, will you point out to the Jury and the Court—I will withdraw that. On December 14, 1938, was there any buildings located on that north side of that street?

A. Yes, there was.

Q. Will you mark on that map what buildings were located there on that date that you know of?

A. On Lots 1, 2 and 3 of Block 2, Unit 4, Boomtown subdivision, is the property occupied by the Shadows Dance Hall.

Mr. Landrum: That is the Agnew property?

A. That is the property that it occupies. And on portions of Lots 1, 2, 3 and 4 of Block 1 of that same division, Unit 4, is [317] the building now used as a schoolhouse.

Mr. Landrum: What was it then—don't say it is a schoolhouse—what was it then?

A. It was a labor temple at that time.

Mr. Landrum: It wasn't a school, was it?

Mr. Stimmel: That is all the questions on this map.

Q. Mr. Pearl, I will ask you to identify this map as to whether you prepared that or that was prepared under your direction.

A. Yes, I prepared it.

Q. Does that depict the conditions of the area in reference to the lines of the property owned by Mr. and Mrs. Johnson on the fourteenth day of December, 1938?

A. Yes, it does.

(Testimony of George L. Pearl.)

Mr. Stimmel: We will offer this in evidence.

Mr. Landrum: No objection, your Honor.

The Court: Admitted.

(The map referred to was marked Defendants' Exhibit "F".)

Mr. Stimmel: Q. Now, will you explain that map to the Jury as to what the blue lines mean and the red lines. A. The blue lines——

The Court: Does this diagram pertain to the Rouge property?

Mr. Stimmel: No, this is the Johnson property.

Mr. Landrum: The Johnson property.

A. The Elmer and Hilma Johnson property is outlined by this water color line that you see there.

Mr. Stimmel: Q. What is the area?

A. Approximately 30 acres in area. The red line is approximately the boundaries of the railroad location. It doesn't quite show it as it is; this has been changed since the recording of this map, cutting——

Mr. Landrum: Just a moment. Just a moment. That is objected [318] to on the ground and for the reason that the witness is not now answering the question. I move the statement of the witness be stricken from the record.

The Court: So ordered.

A. In a general way it indicates the railroad area, and contains 4.81 acres. This parcel to the north is 6.1 acres, and the parcel to the south is about 6.2 acres.

(Testimony of George L. Pearl.)

Mr. Stimmel: Q. The total area included in the blue line to this Red Bluff Street contains how many acres? A. 17 acres.

Q. The portion in the right-of-way proper is 4.81 acres? A. That is right, yes.

Q. Now, are you familiar with the topography of this land as of December 14, 1938?

A. Yes, Sir.

Q. Was that prior to any construction of the railroad right-of-way on there? A. Yes, Sir.

Q. What was the nature of the topography and terrain of this land?

A. It is rolling, hilly land.

Q. With reference to this portion, what was the terrain, the type of terrain over here (indicating on map)?

A. The westerly portion is a hill, gradually descending into the east into a valley on the easterly side.

Q. And what was the nature and character of this portion of the land (indicating)?

A. Similar; I would say less growth.

Q. And down in this area (indicating)?

A. As it runs to the south it becomes gradually more level.

Q. Can you point out on this map where the Central Valley Post Office is situated? [319]

A. I believe the Central Valley Post Office—

Mr. Landrum: Just a moment, just a moment, if the Court please. I don't know whether—this is

(Testimony of George L. Pearl.)

the first we have heard about Central Valley—is that the Boomtown Post Office?

A. That is the Post Office of Central Valley.

Mr. Landrum: Q. Well, has it always been Central Valley? A. Yes.

Mr. Stimmel: Q. All right, point out on this map where the Central Valley Post Office is.

A. The Central Valley Post Office is located on the corner of Montana Avenue and Front Street.

Q. I wish you would mark that. (The witness marks on the diagram.)

Q. Now, as of December 14, 1938, were there any buildings located in this area (indicating)?

A. Yes, there were.

Q. What was the nature of those buildings? What were their occupancies?

A. These buildings along Front Street are stores.

Q. Are there any buildings along—this is an alley here apparently—this is—

A. Main Street.

Q. Oh, Main Street. Now, were there any buildings located on Main Street in that area on December 14, 1938?

A. Yes, there were buildings on Main Street at that time.

Q. Do you remember whether there were any buildings on Chico Street?

A. Yes, there were buildings on Chico Street.

Q. Now, will you locate for the Court and the Jury where the underpass is on this map, if it is on the map?

(Testimony of George L. Pearl.)

A. The underpass doesn't show on the map, but the location is at the intersection of Grand Coulee Boulevard and the reserved area for the railroad.

[320]

Q. How wide is this right-of-way?

A. 300 feet.

Q. So that the Court and Jury may understand, what property is this located on this side (indicating on map)?

A. That is the Leland and Nell Kronschnabel property.

Mr. Stimmel: I think that is all, your Honor.

Q. Did you observe the construction of the railroad here, along this line (indicating)?

A. Along the northerly right-of-way line?

Q. Yes. What is the condition of the property along this right-of-way?

A. The construction line does not go out to the right-of-way line. It is inside—if that is the question—there is a cut.

The Court: Designate that line by a number or a letter, so the record will be clear.

Mr. Landrum: As I understand it, the railroad right-of-way where the cut is at doesn't run up to the piece we are taking, is that right?

A. No.

Mr. Stimmel: Yes, I suggest for clarity you draw a line on there about where it is. Can you do that?

A. No, I am afraid I can't do it.

Q. In other words, not accurately?

A. No.

(Testimony of George L. Pearl.)

Q. Now, on this side of the railroad right-of-way is there a fill or a cut, or what is there?

A. There is a fill on the southerly side of the right-of-way.

Q. Now, is there any fence along the right-of-way on the sides dividing the upper and lower portions of the Johnson property from the right-of-way?

A. Yes, the right-of-way is fenced at this point on both sides.

Q. Is there any crossing—road crossing from the upper portion of the land to the lower portion of the land? [321]

Mr. Landrum: Across the right of way, is that what you are talking about?

Mr. Stimmel: Yes, that is my question.

A. Yes. [322]

Examination by Mr. Kennedy:

Mr. Kennedy: Q. Mr. Pearl, would you refer to the map—I believe it is called Defendants' Exhibit B—does that have the so-called Unit No. 4 on it? A. Yes, it shows Unit 4.

Mr. Kennedy: If your Honor please, as a matter of simplifying the record, I think it unnecessary to have a separate map of Mr. Agnew's property. I am going to have the witness mark and designate it on Defendants' Exhibit B.

Mr. Landrum: That is all right.

Mr. Kennedy: Q. Will you point out Lots 1, 2 and 3 of Block 2 of Unit No. 4?

(Testimony of George L. Pearl.)

A. Lots 1, 2 and 3 of Block 2, Boomtown Unit No. 4. (Indicating)

Q. That is the property referred to in the morning session of the Court upon which you said there was a building on December 14, 1938, known as the Shadows?

A. Yes, Sir.

Q. Will you kindly, with another colored pencil or pen, outline that particular property on the map—Defendants' Exhibit C.

(The witness marks on the map as requested.)

Q. By that mark you have designated the portion of the so-called Agnew property described in the complaint?

A. Yes.

Q. I ask you to bound it so that that map will also show the Jurors where the property is located.

(The witness marks on the diagram.)

A. That outlines the three Agnew lots.

Q. Lots 1, 2 and 3 of Block 2, Unit No. 4?

A. That is correct.

Q. And the heavier area to the right or east side designates the [333] location of a strip of land described and taken by the complaint in this action?

A. Yes, Sir.

Q. Mr. Pearl, would you also designate on that map the boundaries of the property which you referred to in your examination this morning where a building now used as a school is located, but it wasn't a school at that time?

A. In the same color?

Q. Yes. In the Agnew property. [334]

(Testimony of George L. Pearl.)

Cross Examination

By Mr. Landrum: Q. Now, Mr. Witness, I am going to ask you to sit here where we can see this, and I am going to show you Defendants' Exhibit No. A, which is a certified copy of your original plat of Boomtown Unit No. 4, and ask you whether or not that shows the Agnew property which you have just pointed [335] out to us on the map which is on the board. A. Yes, sir.

Q. And the map which is on the board was made from this plat, was it not?

A. That is true, yes.

Q. Now, I understood you to say a few moments ago that at the time Mr. Agnew was on these premises—that Mr. Agnew was on these premises on December 14, 1938; that is correct, is it not?

A. Yes.

Q. Now, the date of this plat—in other words, the date you completed it is March, 1938, is it not?

A. That is true.

Q. Was Mr. Agnew on there then?

A. I can't say.

Q. Well, when you made this plat in March, 1938, whether he was there or not, you made a dead end street down here on this plat, didn't you?

A. Yes.

Q. And if Mr. Agnew came there after you made this plat that dead end street was already there when he came there, was it not?

(Testimony of George L. Pearl.)

Mr. Kennedy: What do you mean by "there"?
You mean on the——

Mr. Landrum: On the plat.

Mr. Kennedy: Mr. Landrum——

Mr. Landrum: Q. This map was recorded, wasn't it? A. Yes.

Q. It is of record in the County Recorder's Office? A. Yes.

Q. Now, what I am trying to get at is Mr. Agnew bought certain lots? A. He did.

Q. What lots did he buy?

A. I think he bought Lots 1, 2 and 3.

Q. That is Lots 1, 2 and 3 on this plat?

A. Yes. [336]

Q. What I am trying to have you say is whether or not on your plat, which you made, which you completed in March, 1938, which contains Lots 1, 2 and 3 which he bought, there was on that recorded plat a dead end street already there.

A. Yes. The plat speaks for itself.

Q. Yes. Thank you. By the way, Mr. Witness, there have been several other plattings in the locality of this? A. Yes.

Q. Did you plot Santa Claus?

A. Yes, I did.

The Court: Do you wish to be seated?

Mr. Landrum: I just wanted to ask if he plotted Santa Claus.

Q. Can you tell the Jury where you got the name, Santa Claus?

(Testimony of George L. Pearl.)

Mr. Goldstein: Just a minute. What have you reference to, some place near Redding?

Mr. Landrum: Q. Well, Mr. Witness, Santa Claus was a place near where the railroad was going to go through, too, wasn't it?

Mr. Goldstein: If the Court please, we object to this on the ground it has no bearing on the issues here. We didn't go all around ten miles away—the cross examination must be confined to the very locality we asked the witness about. I don't know what the probable inference is, but I don't think it is competent.

Mr. Landrum: All right, we won't ever know.

The Witness: I would like to clear it up for Mr. Landrum; I am not responsible for that name.

Mr. Landrum: Yes, I know you aren't. Are you responsible for "Boomtown"?

Mr. Kennedy: Mr. Landrum, isn't it understood the official name was Central Valley?

Mr. Landrum: No, Boomtown.

Mr. Kennedy: The Government had selected the name of Central [337] Valley?

Mr. Landrum: Q. Mr. Witness, I will ask you to examine your exhibit, Defendants' Exhibit No. A, and tell us whether the official name on that plat is not Boomtown.

A. Boomtown Unit No. 4.

Q. Mr. Witness, I understood you to say there was no access to Boomtown No. 9. I ask you what street allowed access and egress into Boomtown No. 9 before the filing of this suit on December 14, 1938.

(Testimony of George L. Pearl.)

A. North Boulevard, as it was traveled.

Q. North Boulevard allowed access. When you made these plats were you instructed to so plat the lots abutting the right-of-way as to leave them with no ingress and egress?

A. I was instructed to make any reasonable concession that the Bureau of Reclamation asked.

Q. Mr. Witness, it is not a question about the Bureau asks. I am asking you what you did. I take it that you platted this property for the owner of it?

A. Yes.

Q. He hired you to do it?

A. Yes.

Q. He paid you for it?

A. He did.

Q. And his name is Mr. McConnell?

A. He was the owner.

Q. I thought there was another man that owned some of that.

A. Mr. McConnell was the record owner.

Q. Now, did Mr. McConnell, the record owner, when he hired you and paid you for platting this property tell you to plat these lots along the right-of-way so there would not be any way to get into them and any way to get out of them?

A. No, he did not.

Q. You did, however, didn't you?

A. I did. [338]

Q. Thank you, Sir. Tell me whether that is closer to the Post office than this (indicating).

A. That is, yes.

Q. Is it customary to plat the land that is further away or closer—

(Testimony of George L. Pearl.)

Mr. Kennedy: Object to that as incompetent, irrelevant and immaterial, what is customary.

Mr. Landrum: "Q. I will ask you whether or not it is good engineering practice, Sir.

A. As an engineer you usually follow the dictates of the man that hires you.

Q. Yes, Sir. And I also notice that the Johnson tract, which I believe is Tract No. 4—I may be wrong, it is hard to keep all these numbers in mind—that is not platted here, is it?

A. No, it is not.

Q. By the way, were there any buildings at all up in here on December 14, 1938?

A. I am afraid I can't testify to that. I don't know. [339]

Q. When did you make this—when did you go out in the field to make a survey from which you made those plats? When was that?

A. Unit 9, field work was done during October and November, 1938.

Q. Do you have in Defendants' Exhibit A No. 9?

A. Yes, Sir.

Mr. Kennedy: It is the last one, Mr. Landrum.

Mr. Landrum: May we see it?

Q. When did you say it was done?

A. October and November, 1938.

Q. That plat wasn't completed by you until November, 1938?

A. That is true.

(Testimony of George L. Pearl.)

Q. By the way, did you develop these units—I understand you had about ten of them—did one of them follow the other from time to time?

A. Yes.

Q. Which ones came first?

A. Unit 1 came first, I believe.

Q. All right. Now, when did you go and survey for Unit No. 2, make that plat?

A. I think that was commenced late in 1936 or the early part of 1937.

Q. In 1936 did you take into consideration this railroad at that time?

A. Unit No. 1 is not in the same line of the railroad.

Q. Did you take into consideration this railroad at that time? A. I did not.

Mr. Kennedy: I didn't hear the answer.

The Court: He said he did not.

Mr. Landrum: He said he did not. Just a moment.

Q. I want to know when you went into the field and made the surveys from which you prepared Bloomtown No. 4, which is shown on Defendants' Exhibit No. A, which you finished in March, 1938? [340] When did you do it in the field?

A. In September, 1937.

Q. September, 1937, and you put the proposed right-of-way for the railroad on it, didn't you?

A. I did.

Q. So, in September, 1937, you went out in the

(Testimony of George L. Pearl.)

field and you put the right-of-way for the railroad on that plat? A. Yes.

Q. So, some one did know about where it was going to go in September, 1937, when you put it on the plat, some one did? A. I knew it.

Q. Do you think your boss did, the man that hired you? A. I don't know.

Q. What buildings, if any, were on that property then?

A. I can't answer that.

Q. Well, you went out in the field and surveyed it, didn't you? A. Yes.

Q. Have you got your field notes with you?

A. No, I haven't.

Q. You know there wasn't any on there, don't you?

A. I don't think there were any buildings except the one on the Charles House property. I believe there was a dwelling there.

Q. Well, now, let us get all of Boomtown, then. When did Boomtown first begin to boom?

A. The very late part of 1936 or the early part of 1937, along about that time of the year. [341]

Redirect Examination

By Mr. Goldstein:

Q. Now, I am going to ask you, Mr. Pearl, at whose request did you plat on Boomtown Unit No. 4 the proposed railroad right-of-way?

Mr. Landrum: That is objected to as incompetent, irrelevant and immaterial.

(Testimony of George L. Pearl.)

Mr. Goldstein: Your Honor can see the unfairness of that.

The Court: Objection overruled.

Mr. Landrum: Exception.

Mr. Goldstein: Q. You may answer that.

A. The railroad was platted there at the request of the Bureau of Reclamation. [342]

Q. Did you have any official map of any kind in 1936? A. No, I did not.

Q. And as you testified this morning, the first one you had any knowledge at all is the one marked for identification. A. Yes.

Q. That is from the Redding office of the Bureau of Reclamation? A. Yes.

Q. Did you, when platting these subdivisions, use any Government map for the purpose of putting in that right of way?

A. I used the information from the plat that was marked for identification this morning.

Q. That is the one that you used? A. Yes.

Q. Did you ever use any other map?

A. No, that is the only one.

Q. The only one? A. Yes. [344]

JOHN J. HUMPHREY, SR.

Mr. Goldstein: If your Honor please, this evidence will pertain to Parcel No. 1 standing of record in the name of Lee Kronschnabel, Victor Miller and John J. Humphrey, and Parcel No. 4,

(Testimony of John J. Humphrey, Sr.)

Charles J. McConnell, John J. Humphrey and Victor Miller; Parcel No. 1—my attention being directed to 3.11 acres in the Rouge tract, and Parcel No. 4 to 10.61 acres in the—what is known as the Kelly tract, or Unit No. 4—the Rouge tract as Unit No. 5.

Direct Examination

By Mr. Goldstein:

Q. Your full name is John J. Humphrey?

A. Yes, Sir.

Q. How old are you, Mr. Humphrey?

A. Forty-eight.

Q. Are you married, Mr. Humphrey?

A. Yes, Sir.

Q. Have you a family? A. Yes, Sir.

Q. What does it consist of?

A. Wife and a boy.

Q. Where do you reside, Mr. Humphrey?

A. Boomtown.

Q. In Shasta County? A. Yes, Sir.

Q. How long have you resided in Shasta County? A. Just about four years.

Q. Where did you reside prior to that time?

A. Hollywood.

Q. Hollywood, California? A. California.

Q. What is your present business or occupation?

A. Subdivider and developer of real estate.

Q. Have you a real estate license also?

A. Yes, Sir.

(Testimony of John J. Humphrey, Sr.)

Q. How long have you been engaged in the sale and purchase of real estate?

A. Over a good many years.

Q. Prior to the time you went to Redding had you had any experience in the sale of real estate.

A. Yes, sir. [345]

Q. Did you have any other vocation other than selling real estate? A. Yes, sir.

Q. What was it?

A. Approximately twenty years' experience at various jobs in the studio pertaining to the layout and development of pictures, classified as art direction.

Q. Art direction? A. Yes, Sir.

Q. Did that include landscaping work?

A. Yes, Sir.

Q. Aside from that, then, your other vocation has been that of selling real estate?

A. Yes, Sir.

Q. Do you occupy any official position at the present time in the County of Shasta?

A. Yes, Sir.

Q. What is it?

A. County Planning Commissioner.

Q. You are a member of the County Planning Commission? A. Yes, Sir.

Q. How long have you been a member of that County Planning Commission?

A. Oh, something over three years, approximately three and a half years.

(Testimony of John J. Humphrey, Sr.)

Q. Now, Mr. Humphrey, when did you first become acquainted with the section up there referred to here as Boomtown?

A. Beginning in 1936 and 1937, that was when I became acquainted with it.

Q. These subdivisions here marked Boomtown, what is the name of the location itself?

A. Central Valley, recognized by the Post Office Department as Central Valley.

Mr. Landrum: Just a moment, if the Court please, I move that the last part of that be stricken as not responsive. He was asked the name. He is now going on—

The Court: Yes. [346]

Mr. Goldstein: Yes. Consent it be stricken out.

Q. The name of the locality, you said, was Central Valley? A. Yes, Sir.

Q. Now, these subdivisions are called Boomtown? A. Yes, Sir.

Q. That is the name of the subdivisions, I take it? A. Yes.

Q. Not the name of the city itself, or the town?

A. No.

Q. Are you part owner of what has been described here as the Rouge tract, excluding the portion owned by Mr. Rouge shown on Defendants' Exhibit B? A. Yes, Sir.

Q. What part of that property do you own?

A. One-third.

Q. An undivided one-third interest?

(Testimony of John J. Humphrey, Sr.)

A. An undivided one-third interest.

Q. Who are the other owners?

A. Major Miller, and Mr. Kronschnabel.

Q. Major Miller, does he own an undivided one-third interest? A. Yes, Sir.

Q. And Mr. Lee Kronschnabel another undivided one-third interest? A. Yes, Sir.

Q. Were you the owner of an undivided one-third interest in that property on December 14, 1938, and prior thereto? A. Yes, Sir.

Q. Some time prior thereto? A. Yes, Sir.

Q. There has been offered in evidence here these exhibits—I will just briefly call your attention to Defendants' Exhibit B, which has reference to the Rouge tract. [347] A. Yes.

Q. Were you familiar with that property, that Rouge tract, on December 14, 1938?

A. Yes, Sir.

Q. Will you please state to the Jury what was the character of the land immediately around that tract?

A. On the date of December 14, 1938?

Q. Yes.

A. It was subdivided land and in process of development.

Mr. Landrum: Just a moment, if the Court please, I move that the answer be stricken out on the ground and for the reason it is not responsive to the question. He is asked to describe the physical characteristics, and he starts off now saying it is a subdivision.

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: I am asking about the land immediately around that particular tract of land. I want to show the character around that. May I have the question read?

The Court: Read it, Mr. Reporter.

(The reporter read the question and the answer.)

The Court: That is responsive.

Mr. Goldstein: That is responsive.

Q. Now, then, did you yourself make sales of parcels of real estate—answer this yes or no—in that vicinity? A. Yes, Sir.

Mr. Landrum: That is objected to on the ground and for the reason it is indefinite as to time.

The Court: Fix the time.

Mr. Goldstein: Q. Prior to December 14, 1938.

Mr. Landrum: That is objected to upon the ground and for the reason it is incompetent, irrelevant and immaterial, and includes a time subsequent to the Act of Congress. It is our position, your Honor, and in order it may be perfectly plain for the record, [348] this case is controlled by the Shoemaker case, a decision of the Supreme Court of the United States, wherein the Supreme Court held that they could not show sales of land in the vicinity made subsequent to the Act of Congress creating Rock Creek Park, and it is our position their sales must be prior to the time of the Act of Congress establishing this project. It is our position further that on direct examination he can say he made sales, but he *could* not say what he made them for.

(Argument.)

(Testimony of John J. Humphrey, Sr.)

The Court: We will recess at this time. It is recess time, Ladies and Gentlemen of the Jury, we will have the usual recess. Remember the admonition given you by the Court, and observe it, please. A ten minute recess.

(A recess was taken, at the conclusion of which it was stipulated by the counsel that the Jurors were all present in the Jury Box.)

(Further argument.)

The Court: The objection is sustained.

Mr. Goldstein: Q. Mr. Humphrey, directing your attention to the tract referred to as Parcel No. 1, the Rouge tract, which I asked you about prior to the time that the matter came up before the Court, you say that you were one of the owners of that tract of land on December 14, 1938?

A. Yes, Sir.

Q. I will ask you to state what was the fair market value of that particular piece of land or that tract of land on December 14, 1938?

Mr. Landrum: Just a moment. That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, no foundation laid, on the further ground and further reason that it includes within itself any increased value [349] in this property due to the Central Valley project.

Mr. Goldstein: If the Court please, I am going to answer Counsel's objection two fold: First of all, his objection with relation to foundation. Your Honor is entirely familiar with the law of Califor-

(Testimony of John J. Humphrey, Sr.)

nia that an owner can testify as to the value of his own property, whether real or personal, and no foundation need be laid. The second ground of the objection, with reference to the matter of the inclusion of any values claimed by Counsel is a matter of cross examination and not upon the preliminary question of market value of the property.

Mr. Landrum: Your Honor, that is precisely the same thing, that is precisely covered by the very question which your Honor sustained my objection to. My objection to this question—and it is important—goes to its form, in that it doesn't eliminate from the answer any increased value over the value of the property due to the Central Valley project. If he will ask the value, forgetting—excluding any increase in the value due to the project, I will have no objection, but his question is going right back to the very thing the Supreme Court in the Shoe-maker case says he can't do.

The Court: What have you to say in reply?

Mr. Goldstein: If your Honor please, I can't see the objection to the question I have put, because as a matter of fact an owner has a right at all times to testify to what the value of his property was. If there are any exceptions, it must be developed by cross examination. I can't ask this man to exclude such and such in his value. That is a matter of cross examination pure and simple, but he, being the owner—the law of the State of California is an owner can always testify to the market value of

(Testimony of John J. Humphrey, Sr.)

his property, whether it is real or personal. Now, I can see [350] that Mr. Landrum would like, or it is his intention to have us restrict it to some time before 1935, if his argument progressively is correct — I can't adopt that theory of the case.

Mr. Landrum: Your Honor, I prepared a memorandum on this question, and I would like to add it right on to what I just said a moment ago. It is precisely the same question. In other words, he has asked him what his opinion of the value of this land was as of December 14, 1938, and he has not excluded from that figure any increase in the value due to the project.

Mr. Goldstein: If the Court please, I still say I don't believe Mr. Landrum is familiar with the California law with reference to the property of an owner.

The Court: The Court will be very glad to hear the law on that first before the Court rules.

Mr. Goldstein: You mean in connection with that matter?

Mr. Landrum: There is no question, your Honor, but that an owner can testify to the value of his own property if it is based on a proper hypothetical question, including within it the thing I have suggested, namely, excluding any added value due to the project.

Mr. Goldstein: I think your Honor can bear in mind in Cal. Jur. there is quite an article on the law as to a property owner, that an owner can

(Testimony of John J. Humphrey, Sr.)

always testify as to the value of his property, whether real or personal, without laying any foundation. An expert, you have to qualify, but an owner it is provided by law—

Mr. Hjelm: I think we can save time on that. We agree that the owner can testify to the market value, but our contention is he must exclude any enhancement of value since August, 1937. We agree on the proposition that the law of California is that [351] the owner can testify to the value of his property without laying the foundation—it opens the door to certain kinds of cross-examination—but the point we are making is that in this first question you must ask him to exclude any value of this property which has occurred since August, 1937.

Mr. Landrum: The date of the Act of Congress.

Mr. Hjelm: That is the date of the Act of Congress.

Mr. Landrum: August 26, 1937.

Mr. Kennedy: There seems to be some difference between counsel for the Government. Mr. Landrum suggests you must exclude any value due to the Central Valley project, and Mr. Hjelm suggests you must exclude any increase of value. There may be some other factors causing an increase in the value besides the Central Valley project.

Mr. Landrum: It is true there may be other things, and on that I decided the best thing to do was to give them the very last Act of Congress on it, so I took the last one. I am perfectly willing

(Testimony of John J. Humphrey, Sr.)

for them to take that date which is August 26, 1937.

Mr. Goldstein: If your Honor please, I have before me the complaint as filed here, and after viewing the history of the legislation affecting the condemnation proceedings of this type—that is going back to August 1, 1936, which is the original act and acts amendatory thereto, they finally came down and alleged that on December 22, 1935, by pronouncement of the President of the United States, the project was approved in principle, or, rather, the project known as the Central Valley project was approved in principle but it admits and includes the existence of the project at that time.

Now, let me go further. Now, take the petition as it stands [352] before the Court—to indicate we are not permitted to establish the owner's value—I am not speaking of an expert—I am going to differentiate those two for the moment. The petition alleges the act was passed in 1935. That is the act I referred to a moment ago. That is on December 22, 1935, the petition alleges the President of the United States approved this in principle; that thereafter nothing could be done because of the fact there were no funds to enable them to proceed with the thing and do anything. The Act of 1937 did not pronounce the creation of the project or do anything except to supply funds for something which had been in existence for many years prior thereto. May I read it to the Court? I think it will be far better than my remarks. I call your Honor's attention to page 1 of the amended complaint—

(Testimony of John J. Humphrey, Sr.)

Mr. Landrum: I object to Counsel going through reading the Acts of Congress. The Court has already ruled on this question—the Court has ruled on the objection to this question. Now, may I move the Court to proceed with the trial.

The Court: If you now desire, Mr. Goldstein, to include the inclusion of the Central Valley project in your question, the objection is sustained.

Mr. Goldstein: I am a little bit in the dark as to the ruling of the Court. Is it the Central Valley project or the relocation of the railroad? This Act of 1937 has reference simply to the appropriation of certain moneys for use in that locality, but it wasn't earmarked with any particular project or any particular undertaking. That is where I differ with Mr. Landrum. In the Shoemaker case there was a different proposition there than in this case.

Mr. Landrum: If the Court please, I can cite a lot more [353] cases on that point. I can give you Chief Justice Hughes—

Mr. Goldstein: I admit you have had a lot more experience in these cases than I have and can cite many cases out of your superior knowledge in that regard; but I am trying as best I can.

Now, your Honor, this Act that Mr. Landrum refers to has, in general terms, simply provided certain funds. Those funds were used for divers purposes other than the project itself—not only for the location of the railroad, but for the creation and construction of Government City. It doesn't apply

(Testimony of John J. Humphrey, Sr.)

simply to one thing, and that is why I say we cannot be held to the Act of Congress of 1937, April 26, or April 24, because it is simply an appropriation of money. Now, I can't assume the position of Mr. Landrum that simply because Congress appropriated some money that that would change the situation with reference to any property there. It had already been in existence, and I can show by the witness that sales had been prior to that time, but the idea of Mr. Landrum is to shut out from the question say from August 26, 1937, up to December 14, 1938. I see no authority for it, your Honor, and even assuming that Mr. Landrum would be correct in his hypothesis, basing his claim on the decision cited by him, it would be simply a matter of the instruction of the Court as to how the Jury were to consider the evidence; but in the first instance, are we not to rely on the legis forum—the law of this state—that an owner can always testify to market value of his property. Just recently another decision came down, which was affirmed, that property owners can at all times testify—

The Court: They don't object to that.

Mr. Goldstein: They are objecting to my asking the general question. Now, isn't it more in order for the Government to [354] develop, if they can, by cross examination that that particular value which the owner places either includes any enhanced value, or to show that it is based solely upon that? Now, that is what I am contending for. In other

(Testimony of John J. Humphrey, Sr.)

words, the law cannot be changed that the property owner has no right to testify, that I have to put the qualifying question to him. I have never heard of that, that that question is an improper question addressed to an owner of a property. I know of no such case, and I don't think Counsel can cite any.

Mr. Hjelm: I think, your Honor, it is very simple indeed. The owner may give the value of his property, but if he were to be allowed to give the value of his property in his opinion as of December, 1938, then he would include in that benefits which result from the Government's action, and the law is simple on that, that no one can recover or reward solely from the Government's need and use, so we must exclude any added enhancement due to that. That is our position, that you cannot recover by way of award or reward a benefit which resulted from the Government's need and use. That is so simple all the way through the case. And your Honor will remember you so instructed in the Dr. Muggey case—you passed upon this in the Dr. Muggey case.

Mr. Goldstein: We aren't contending any such principle, your Honor, but we do desire to have some line of demarcation between the Central Valley project and the relocation of the railroad.

Mr. Hjelm: You can't do that.

Mr. Goldstein: You say we can't do that. That is a point which is in dispute. Mr. Hjelm says you can't do that. I claim those two matters are two different things entirely. As far as the act of

(Testimony of John J. Humphrey, Sr.)

August 26, 1937, is concerned, it was simply an appropriation—a deficiency appropriation—by the way, it [355] was really a transfer from the War Department to the Department of the Interior for the purpose of this project. Our position is it is immaterial, it doesn't concern this case at all, because the project itself had been in existence prior to that time.

Mr. Hjelm: Then that puts you in a worse position. Then he could not even show enhancement of value prior to August 26, 1937. That puts you, in other words, back to the time when the first Act was passed.

Mr. Goldstein: That is what you say.

Mr. Landrum: We submit it, your Honor.

Mr. Goldstein: Let me put the question to the witness.

Mr. Landrum: Just a moment; will your Honor rule?

The Court: Yes. I rule that the objection is sustained.

Mr. Goldstein: Q. How long, Mr. Humphrey, have you known this property referred to as the Rouge tract, Parcel No. 1?

A. How long I have known of it?

Q. Yes? A. Since 1936..

Q. 1936? A. Yes.

Mr. Goldstein: I want to have the record show that we take exception with the ruling of the Court in connection with the relegation of our testimony

(Testimony of John J. Humphrey, Sr.)

to value to the date represented by Counsel as August 26, 1937.

Mr. Landrum: The objection, if the Court please, for the purpose of the record, is that the question was improper as to form, in that it included in itself any enhancement in the value due to the project. That was the objection.

The Court: It was upon that the Court ruled. You are entitled to an exception if you want it. The record may show your exception.

Mr. Goldstein: Q. You knew the property, did you, in 1936 and [356] 1937?

A. In 1936 I went over the property walking; about the only way you could get through there in certain parts of it. In 1937 I went into it more thoroughly prior to the time they started work there. I sold property prior to that time, too.

Q. You knew the property in 1937?

A. Yes, sir.

Q. And also in 1938? A. Yes, sir.

Q. As I understand it, you were a part owner of the property on December 14, 1938?

A. Yes, sir.

Q. I will now ask you this question—excluding for the purpose of my question any accretion in value to that property from September 26, 1937, up to the fourteenth day of December, 1938,—

Mr. McMillan: It should be August.

Mr. Goldstein: Q. Continuing: August 26, 1937, up to and including the fourteenth day of De-

(Testimony of John J. Humphrey, Sr.)

cember, 1938, what was the fair market value of that property on December 14, 1938?

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, no foundation laid, and improper as to form. The objection to the question is that it includes in itself any increase in value due to this project. Now, if he frames that question that way, and asks to exclude from the answer any increase in value of this property by virtue of the Central Valley project, I won't object to the question.

Mr. Goldstein: **If the Court** please, I asked the question that Counsel suggested.

The Court: You left out the Central Valley project, enhancement of the value by virtue of the Central Valley project. You left that out entirely. Include that—

Mr. Goldstein: In other words, my position is that the value [357] was there before this Act was passed by Congress. It would have to exclude any accretion of value between August 26, 1937, and December 14, 1938. I naturally inferred and have in mind the Central Valley Water Project.

The Court: You better mention it in your question:

Mr. Landrum: Now, if the Court, please, I want to get this entirely clear in the record. The objection to the question is it includes the increase in the value by virtue of the project. The objection to

(Testimony of John J. Humphrey, Sr.)

the other question is with relation to sales after the Act of Congress.

Mr. Goldstein: I am not asking as to sales. I am not asking anything at all as to sales. I am simply asking him now as the owner of the property—

Mr. Landrum: He knew the property in 1936, 1937 and 1938—

Mr. Goldstein: I will put the question as suggested finally by Counsel: Q. What was the fair market value of the specific piece of property I referred to in Parcel No. 1 known as the Rouge tract, comprising approximately 3.11 acres, on December 14, 1938, excluding from your consideration, the Central Valley project from August 26, 1937 up to that date, to that date of December 14, 1938?

A. That question is more or less confusing, Mr. Goldstein. I can't quite get the difference from '37 to '38 there. I would like to have that read so I can really understand it.

Mr. Goldstein: May I have the question read, your Honor?

Mr. Landrum: If the Court please, I don't think that has exactly been the Government's position. It is our position they are not entitled to any increase in this value due to the project, whenever it arose. The other objection I made was talking about sales after the Act of Congress. [358]

Mr. Goldstein: Now, your Honor, we have a different proposition entirely.

(Testimony of John J. Humphrey, Sr.)

Mr. Landrum: No, you haven't.

Mr. Goldstein: You and Mr. Hjelm both stood here and told us that we could start in with August 26, 1937. Now, the proposition advanced by Mr. Landrum relegates to the value as if the project had never existed. Now, I think Mr. Landrum is wholly inconsistent. He suggested this witness could not answer the question unless any enhancement in the value due to the project from August 26, 1937, up to December 14, 1938, be excluded. That was the sole argument presented to the Court on that question.

Mr. Landrum: Can you find in that record that I have said that?

Mr. Goldstein: Certainly.

The Court: I don't think he said that, Mr. Goldstein.

Mr. Landrum: No, your Honor, the objection I made was this: I objected to his asking this witness whether or not he knew of any sales up there, and I objected upon the ground and for the reason they could not include any sales after the actual commencement of this project.

Mr. Kennedy: You said, "We will be magnanimous and fix it as August 26, 1937, no matter what the date ought to be," or words to that effect.

Mr. Landrum: I certainly did, but what was I talking about? I was talking about the sales. I was making an argument on that question.

Mr. Kennedy: If your Honor please, I would

(Testimony of John J. Huniphey, Sr.)

like to have that statement of Mr. Landrum written up by the reporter.

The Court: I will order it written up by the reporter. It is 4:00 o'clock and we will have to adjourn, and I propose that you [359] and Mr. Landrum can get together and agree on the form of the question.

Mr. Landrum: If your Honor please, can I hand your Honor this memorandum I have prepared on that question? (Handing memorandum to the Court)

The Court: Ladies and Gentlemen of the Jury, you will now be excused until 10:00 o'clock tomorrow morning. You will remember the admonition heretofore given you by the Court, and observe it, please. You are now excused until tomorrow morning at 10:00 o'clock.

(Thereupon an adjournment was taken until Friday, February 2, 1940, at 10:00 o'clock in the morning.) [360]

Friday, February 2, 1940, 10:00 o'clock A. M.

(It was stipulated by and between counsel for the respective parties that the jurors were present in the jury box.)

Mr. Landrum: If the Court please, I hate to disappoint Counsel with his books, but I will withdraw my objection to the question.

Mr. Goldstein: I would like to understand Counsel as to which question the objection is withdrawn.

Mr. Landrum: The last question just before the

(Testimony of John J. Humphrey, Sr.)

Court, adjourned. I will withdraw the objection, your Honor. Let us proceed with the lawsuit.

Mr. Goldstein: May I present the Court one further matter in connection with this?

Mr. Landrum: If the Court please, the Court had ruled on that matter.

The Court: Yes. Proceed.

Mr. Goldstein: Mr. Humphrey.

JOHN J. HUMPHREY, SR.,

a witness called by the Defendants, resumed the witness stand.

Mr. Goldstein: May I have the question read, your Honor?

The Court: Yes.

(The Reporter read as follows: "Q. I will now ask you this question—excluding for the purpose of my question any accretion in value to that property from September 26, 1937 up to the fourteenth day of December, 1938—

"Mr. McMillan: It should be August.

"Mr. Goldstein: Q. (Continuing) —August 26, 1937, up to and including the fourteenth day of December, 1938, "what was the fair market value of that property on December 14, 1938?") [361]

Mr. Landrum: In that connection, if your Honor please, and for the purpose of clarity, I understood your Honor suggested we undertake to get together

(Testimony of John J. Humphrey, Sr.)

on the form of the question. I submitted a suggestion to Mr. Goldstein this morning, and I think it will make the question clear to his witness, and the question which I have submitted to him, if I may read it: "What in your opinion"—this is opinion testimony—"What in your opinion was the fair market value of the parcel of land in this proceeding designated as Parcel No. 1, the Rouge tract, as of December 14, 1938, leaving out of consideration any increase, any increment in your value from and after August 26, 1937 due to the Central Valley Water Project?"

Mr. Goldstein: If your Honor please, for the purpose of the record I withdraw the previous question to the witness and I will reframe the question.

Q. Mr. Humphrey, what in your opinion is the fair market value of the property described in Parcel 1, the Rouge tract, as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Water Project?

A. I will have to answer that question.—

Mr. Landruin: Just a moment.

The Court: Just answer it.

Witness: Answer the question?

Mr. Goldstein: Yes.

A. Approximately of August—

Mr. Landrum: Just a moment. I object to the witness saying approximately.

(Testimony of John J. Humphrey, Sr.)

The Court: That will go out. Give your opinion as to the value in response to the question. [362]

A. Prior to 1937, August of 1937—

Mr. Goldstein: Q. Mr. Humphrey, did you understand the question? A. I did.

Q. I will repeat it again, and just answer this question: What in your opinion was the fair market value of the parcel of land in this proceeding designated as Parcel No. 1, the Rouge tract, as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937, due to the Central Valley Project?

The Court: That calls for an answer in dollars and cents. A. It has two values—

The Court: Just answer the question. Don't give any of your opinion now as to anything else except the value represented in the question.

A. \$12,500 in 1938.

Mr. Landrum: Just a moment—I beg your pardon, Mr. Witness; it is all right.

Mr. Goldstein: Q. This is the parcel I am referring to now, on Defendants' Exhibit B (indicating)— A. Yes.

Q. (Continuing) —the parcel of land marked in the orange-shaded portion. A. Yes.

Q. 3.11 acres. That is the land I am asking you about. A. \$12,500.

Mr. Landrum: Just a moment, if the Court please; I object to the witness repeating that figure. He has testified once.

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: All right. Q. What in your opinion was the fair market value of the parcel of land described as Parcel No. 1 in the Rouge tract as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after May 9, 1938 due to the Central Valley Water Project? [363] A. That is—

Mr. Landrum: Just a moment. That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial. The date—and the Court ruled on it—is August 26, 1937.

The Court: Correct.

Mr. Goldstein: That is a matter I would like to be heard on. It will take me just a few minutes.

Mr. Landrum: If the Court please, as a matter of administration in this Court, I object, your Honor. We went through all that yesterday, and your Honor has ruled on it.

The Court: Yes, I ruled on it.

Mr. Goldstein: Then, I understand all questions addressed to this particular date will be excluded, the date I just mentioned, May 9, 1938? In other words, that the date will be as of August 26, 1937?

The Court: Correct.

Mr. Goldstein: The only reason I asked that, is because I have the Act here which definitely adopts this project as being that date. I have the Act of Congress here, which is the first one.

Mr. Landrum: You have made your record. Now, your Honor, may we proceed?

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: Very well.

Q. Mr. Humphrey, during the time that you were interested in that parcel of land, speaking of the Rouge tract—

Mr. Landrum: You are referring to the 3.11, now?

Mr. Goldstein: Q. (Continuing) —3.11 in Parcel No. 1, did you have any conversations with either Mr. Roy Snell or Mr. John Stafford or Mr. Cashow of the Bureau of Reclamation in connection with any of that land in that parcel?

A. I did.

Mr. Landrum: Wait a minute. I move the answer be stricken for [364] the purpose of the objection.

The Court: It may go out.

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, no foundation laid, not binding, if he did have any such conversation, on the United States of America.

The Court: Objection sustained.

Mr. Landrum: Now, if the Court please, may I ask Counsel—you have your record on that. Please don't take up time—

Mr. Goldstein: I never have asked the witness that question before.

The Court: Proceed.

Mr. Goldstein: Q. Directing your attention to Unit No. 4—this is Parcel 7—that is the other

(Testimony of John J. Humphrey, Sr.)

parcel, comprising 10.61 acres—on December 14, 1938 were you one of the owners of that property?

A. I was.

Q. And what interest in that property did you have? A. A one-third undivided interest.

Q. Who were the other owners?

Mr. Landrum: That is objected to as repetitious. He asked him that question yesterday—

Mr. Goldstein: I never touched this—

The Court: Proceed.

A. Charles J. McConnell and Major Miller.

Mr. Goldstein: Q. Charles J. McConnell and Major Miller? A. Yes.

Q. I will ask you, Mr. Humphrey, to state whether you were entirely familiar with this particular parcel of land sought to be condemned as of December 14, 1938? A. Yes.

Q. I will put the same question to you: What in your opinion [365] was the fair market value of the parcel of land in this proceeding designated as Parcel No. 7 and referred to in the complaint, leaving—as of December 14, 1938—leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Water Project?

A. Seventeen to eighteen thousand dollars.

The Court: Seventeen or eighteen?

A. Yes, Sir.

The Court: Which is your opinion, seventeen or eighteen?

(Testimony of John J. Humphrey, Sr.)

The Witness: Well, split the difference,—
\$17,500.

Mr. Goldstein: Mr. Landrum, may it be understood there will be a general objection to my question to this witness or any other witness as to market value or any other question pertaining to the date I fixed, May 9, 1938? Will you stipulate to that in order to save time?

Mr. Landrum: If your Honor will permit it; I don't know what your Honor's ruling will be on that. I take it, your Honor, he has already made his record, if he wishes one.

Mr. Goldstein: It is just a matter of saving time. I don't want to ask every witness who will take the stand as to the value on May 9, 1938, if it is understood the objection to that question will be made to any question I will put to this witness or any other witness concerning that date—

The Court: I think you better put it, so the record will be clear.

Mr. Goldstein: Q. What in your opinion was the fair market value of the parcel of land in this proceeding designated as Parcel 7, the Kelly tract, as of May 9, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Water Project?

Mr. Kennedy: As of December 14, 1938. [366]

Mr. Landrum: I understood you to say the Kelly tract?

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: The Kelly tract——

Mr. Landrum: I object to the Kelly tract. There is no Kelly tract in this lawsuit.

Mr. Goldstein: Unit No. 7 is the Kelly tract.

The Court: You better describe it as it is known in this proceeding.

Mr. Goldstein: Q. I am speaking now of the 10.61 acres in Unit No. 4, Boomtown No. 4. What is the——

A. We refer to it sometimes as the Kelly tract and again as Boomtown No. 4.

Mr. Goldstein: Q. Refer to it as Boomtown No. 4.

Mr. Landrum: What tract number is it in this proceeding?

Mr. Goldstein: Parcel No. 7.

Mr. Landrum: I thought he had given his answer to that, your Honor.

Mr. Goldstein: No, I asked this man, Mr. Landrum, to get the record clear on this, his opinion of the market value as of May 9, 1938.

Mr. Landrum: All right. May I have the same objection as heretofore?

The Court: Yes, sustained.

Mr. Goldstein: You may take the witness.

Mr. Landrum: Q. Mr. Witness, as I understand it——

Mr. Goldstein: Pardon me, Mr. Landrum; I overlooked one matter. May I ask another question?

Mr. Landrum: All right.

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: I overlooked one matter in connection with the parcel of land there (indicating on map). Q. Are you familiar and were you familiar, on December 14, 1938, with the land [367] immediately adjoining the land in Parcel 1, the 3.11 acres which were taken under the condemnation proceeding? A. Yes.

Q. Were you at that time familiar with the character of the railroad constructed there or to be constructed and also the various properties remaining and belonging to yourself and associates that you described yesterday?

A. Why, I was fairly familiar with the property, but not with the railroad, because they hadn't begun to work there in that area.

Q. Well, can you state to this jury what in your opinion was the severance damage, if any, to the remaining property owned by yourself, Mr. Kronschnabel and Mr. Miller in Parcel No. 1, referred to as the Rouge tract?

Mr. Landrum: Just a moment, if the Court please. That is objected to on the ground and for the reason there is no foundation laid in that there is no showing that this witness knows what severance damage is. I think that there is a portion of that land contiguous in the tract remaining. The witness might give his opinion, if he explains that he knows what that severance damage is.

Mr. Goldstein: If your Honor please, this man is one of the owners.

(Testimony of John J. Humphrey, Sr.)

The Court: I know, but for the purpose of the record you should have something about his knowledge.

Mr. Landrum: Is there other land contiguous to the left of your—

Mr. Goldstein: I will ask the witness. Q. Mr. Humphrey, will you please come down to this blackboard here and indicate just what land is left there owned by Mr. Kronschnabel, Major Miller and yourself in Parcel No. 1.

A. What parcels and what lots?

Q. The parcels and the lots—just what the situation was there [368] in connection with your ownership, first.

A. We have a fraction of land left here below the right-of-way (indicating on map).

Q. How many acres is that?

A. It is a fraction of an acre.

Mr. Landrum: What is the fraction?

A. Oh, I imagine around—

Mr. Goldstein: Q. Will you mark that, please?

A. About something like that. I have other maps. Our map would probably show it.

Mr. Landrum: Now, if the Court please, I am going to object to any testimony regarding severance damage on that, because on their map, we are taking it all; their own witness, their own surveyor said we were taking it all. They can't come in—

The Witness: According to my check, you haven't taken it all.

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: Q. Where is this particular piece of land you are speaking about?

A. Right here in this section corner (indicating on map).

Q. In the section corner? A. Yes.

Q. What about the other side?

A. On the other side we have all this remaining property here (indicating). Everything in north from here (indicating).

Q. What have you there remaining unsold, what is the situation there?

A. Well, we have possibly three, four—we possibly have five city blocks unsold.

The Court: We have to know definitely. You can't deal in approximations in expressing opinion on value. We should have some definite testimony as to the exact area or dimensions.

Mr. Goldstein: I think we will show that. We will connect that up by Mr. Kronschnabel himself. He has charge of the tract. [369]

Q. Can you state right along the right-of-way what lots are there which are severed?

Mr. Landrum: Just a moment, if the Court please. I am going to object on the ground and for the reason there is no foundation laid for severance damage, and further that on their own exhibit and on their own evidence in this case there cannot be any severance damage, for the simple reason the property he claims severance damage on is not contiguous to the right-of-way, on their own map.

(Testimony of John J. Humphrey, Sr.)

There is no unity of use been shown, and no contiguity been shown by their own map.

Mr. Goldstein: If your Honor please, I desire to call the Court's attention to the fact there is a strip 50 feet wide, and the government map shows the same thing—there is a strip of 50 feet running clear through the Rouge tract down to the end of the section line. It is very clear that the witness has a right to explain just what the situation is there regarding those lots.

Mr. Landrum: There is no objection to that, your Honor, but he should not be permitted to go over on other lots not contiguous.

The Court: There must be some foundation for testimony on severance. That has not been established.

Mr. Goldstein: I am going to ask the witness to explain the condition as to those lots immediately on the right-of-way first.

A. There is one, two, three, four, five, six, seven—there are seven lots affected by the severance directly.

Q. In what way?

A. Well, they are sheared right in two.

Q. Have you had any experience at all—

Mr. Landrum: Just a minute. Did the witness testify he owns these lots?

A. I own one-third.

Mr. Landrum: Who owns the other two-thirds?

(Testimony of John J. Humphrey, Sr.)

A. Mr. Kronschnabel and Major Miller.

Mr. Landrum: Now, if the Court please, according to their own testimony Mrs. Van Santen—Where is her property?

A. We are owners of that property until it is paid for by the Van Santens under the terms of the contract.

Mr. Goldstein: The Van Santen property is a very small portion; it is a five-foot strip there.

Q. Just point out the property right immediately adjoining the right-of-way.

A. All the property lying under a fill, approximately eighteen to twenty feet, there are houses along here.

Q. What became of those particular portions of property, of the Subdivisions lying along the right-of-way there?

A. They are practically valueless, because we can't even offer them for sale; they don't want to live there.

Q. Can you give the jury an estimation as to the value of that property immediately along the railroad right-of-way as of August 26, 1937?

A. The railroad part?

Q. The railroad part.

A. All these lots lying from this point to approximately this point (indicating on the map), have lost a value due to the severance there of from \$400 a lot to practically nothing.

Q. How many of those are there?

(Testimony of John J. Humphrey, Sr.)

A. There is one, two, three, four, five, six directly, and the Van Santen property, which is another one. [371]

Cross Examination

Mr. Landrum: Mr. Witness, I understood you to say you came from Hollywood?

A. I did.

Q. I understood you to say you were a landscape artist at Hollywood? A. I was.

Q. What is a landscape artist?

A. A landscape artist is a man that lays out different tracts of land or plots of ground for decorative purposes or stage sets as we call them.

Q. Is that the same thing as is called a landscape gardener? A. Yes, in a way.

Q. But when they are in Hollywood it is landscape artist?

A. If we are plotting them on the stage, yes.

Q. Now, I believe you worked on that job in Hollywood twenty years?

A. I contracted there approximately fifteen years, contracting, and I worked with the different studios altogether twenty years.

Q. You came up here about 1936, did you?

A. Yes.

Q. What experience, if any, did you have in connection with the buying and selling and appraisal of real estate before you came up here?

A. Buying and appraising, you say?

Q. Yes.

(Testimony of John J. Humphrey, Sr.)

A. Not as a professional appraiser, but appraised for my own information for a period of almost thirty years.

Q. Mr. Witness, I am going to ask you again what is your full name?

A. John J. Humphrey Sr.

Q. You testified, did you not, in the case tried in the Superior Court of the State of California in Shasta County in April 1937?

A. I did.

Q. State whether or not in answer to your Counsel's question at that time you didn't reply that you had only had one year's experience in real estate in Southern California?

A. I stated here I had approximately a year in actual subdivision work.

Q. About a year?

A. Yes. [388]

Q. Now, Mr. Witness, let me ask you this: You testified in that case, did you not, for Mr. McReynolds?

A. I did.

Q. You testified in that case for Mr. McReynolds when the State of California started to put a highway through there?

A. I did.

Q. You got there just before that highway came through?

A. A few months prior.

Q. So in this case in the State of California you got in there just before the state highway, that is right?

Mr. Goldstein: I am going to object to this on the ground there is no materiality of this examination in connection with the issues here. This man is an

(Testimony of John J. Humphrey, Sr.)

owner—I have the record here—this man was called by Mr. Jesse W. Carter in behalf of Mr. McReynolds, and he was asked to testify in regard to the value of the land being taken by the state for the highway, and he was one of the property owners.

Mr. Landrum: May I call the Court's attention that I am cross examining the witness?

The Court: Yes. Proceed. Objection overruled.

Mr. Landrum: Q. I will ask you again, Mr. Humphrey, if you didn't get in there and put up a little umbrella real estate stand right next to Mr. McReynolds just before the state came in there to condemn that land?

A. I did and I am proud of it.

Mr. Goldstein: Just a minute. We object to that as—

Mr. Landrum: You did—

Mr. Goldstein: Just a minute. I object to that characterization in his own question as an umbrella real estate stand; that is certainly incompetent, irrelevant and immaterial, and I object to it—

Mr. Landrum: He stated that is what he did and he was proud of it, and I have the right to know the transaction.

Mr. Goldstein: If you have any such testimony I would like to [389] have you read it to the jury. I have no objection.

Mr. Landrum: It may take me just a few moments to find it in this transcript—the witness said here he did it and said he did so testify and said he was proud of it.

(Testimony of John J. Humphrey, Sr.)

Mr. Goldstein: I didn't understand he said that.

Mr. Landrum: Yes, he did.

The Court: Proceed.

Mr. Goldstein: What an umbrella stand is, I don't know.

Mr. Landrum: That is a real estate office.

Q. Now, Mr. Witness, you got in here just when this project started and bought some land we are taking, too, didn't you?

A. What is the question?

Q. When did you first buy any land we are taking under this condemnation proceeding?

A. Clear back as early as the early part of 1936.

Q. 1936, and that was about the time that Mr. Mellin says that he saw some railroad stakes on the ground, isn't it?

A. I think so.

Q. And you got in here as a subdivider just before the Government started a condemnation on this piece of land?

A. Just before, you say?

Q. Yes, 1936.

A. Quite a time before.

Q. Now, tell us when you bought this piece of land in this action you say you own?

A. Which piece are you referring to?

Mr. Kennedy: May I ask Counsel which piece he refers to?

Mr. Landrum: The property he owns. How many acres of land did you buy when you first bought in here with these other gentlemen?

Mr. Kennedy: Can I ask Counsel to specify which parcel is involved?

(Testimony of John J. Humphrey, Sr.)

Mr. Landrum: Q. Parcel 7. Are you interested in that? A. Yes.

Q. How many acres did you gentlemen buy when you bought that parcel? [390]

A. That is part of a parcel, I think, of 153 acres.

Q. Yes. A hundred and fifty-three acres. When did you buy it? A. In the spring of 1937.

Q. Is that the same piece of land that you testified in the McReynolds' case you had just bought three or four months before that? A. No.

Q. You testified you had just bought a piece of land on Highway 99 about eight miles from Redding.

A. I did not. I testified I made an offer for land eight miles north of Redding.

Mr. Landrum: I want to find his testimony in this transcript, if I may, your Honor. May I approach the witness, your Honor?

The Court: Yes.

Mr. Landrum: Q. Mr. Witness, I want to show you a little snapshot and I will ask you if you have seen this before and if you know where it was located?

A. I know that that was one of Major Miller's same signs that we bought and paid for.

Q. About where was it located?

A. In what particular part of Boomtown that was located I don't want to state here, because that is the way all of Boomtown looked, if that will satisfy you.

Q. When was that?

(Testimony of John J. Humphrey, Sr.)

A. The beginning of 1936 and the time prior thereto.

Q. If I suggest to you that little snapshot was taken on the first of December, 1937, would you say that is the way Boomtown looked at that time?

A. The first part of 1937?

Q. The first of December 1937.

A. I wouldn't say in 1937 there hadn't been any development.

Q. Would you or would you not say, Mr. Witness, that the greater part of Boomtown was just brush land like that on December 1, 1937?

A. Yes, and there is some yet.

Q. How about the land we are taking here? Was that brush land on [391] December 1, 1937?

A. Brush land—a part of it was cleared—

Q. Were there any through streets in there?

A. Not right in the right-of-way, was there any through streets. The House place was cleared, but the House place is further east than that.

Q. Then, if there was brush on December '37 it certainly was brush on August 26, 1937?

A. No, we were working there all the time.

Q. I am asking whether or not the pieces we are taking here was brush land?

A. I said there was brush land in there in this part, there is still brush—

Q. Then, if it was brush land on December first of 1937, there was brush land on August 26, 1937, about five months before that, isn't that correct?

(Testimony of John J. Humphrey, Sr.)

A. No; we were working continuously getting this cleared. [392]

JOHN J. HUMPHREY, SR.,

resumed the witness stand.

Mr. Landrum: We have no further cross examination.

Mr. Goldstein: Your Honor will recall we reserved asking the witness something in connection with these parcels of land; it will just take a few minutes.

Redirect Examination

Mr. Goldstein: Q. I believe I asked you this morning in connection with the property immediately——

The Court: Turn it around at a different angle so the jury may see.

Mr. Goldstein: Q. (Continuing) ——the property immediately on the right-of-way in Parcel No. ——rather, in Unit No. 4, being Parcel No. 7 under consideration. Did you during the noon recess ascertain the taken property by acreage lying north of the flare first and immediately adjoining the right-of-way owned by yourself and associates?

A. Yes, sir.

Q. Now, in order to demonstrate that, show us the property on the map here, Defendants' Exhibit

C. A. It would be Lots——

Mr. Hjelm: No, acreage——

Mr. Goldstein: I am just asking him to point them out on the map.

(Testimony of John J. Humphrey, Sr.)

A. It would be Lot 8 of Block 2, lot of Block 6—Lot 2—1, 2, and 3 of Block 6, a portion here—then I would say—wait just a minute—and Lot 7 is affected in Block—

Q. Just a minute. I am asking you north of the flare, first.

A. There is approximately a third of an acre in this 1, 2, 3, 4 and [394] 5 affected.

Mr. Hjelm: Move that the word "affected" be stricken out.

Mr. Goldstein: Q. Just—you have given the lot numbers.

A. Lot 8 of Block 2.

Q. Now, the next one. A. Lot—

Mr. Landrum: Now, just a moment, if the Court please; I am not entirely clear on that. You mean we have taken part of that lot, the taking has affected that particular portion?

Mr. Hjelm: I renew my objection to that on the same grounds.

Mr. Goldstein: Your Honor ruled according to the statement of Mr. Hjelm they could be considered as of the value at the time the map was filed or at the time of August 26, 1937.

Mr. Landrum: As brush land.

Mr. Hjelm: As brush land.

Mr. Goldstein: No, not brush land—we will show what the condition was on August 26, 1937.

Mr. Hjelm: If they want to show it as acreages with that date, it is all right.

Mr. Goldstein: That is exactly what I am trying to show.

(Testimony of John J. Humphrey, Sr.)

Q. I will put it this way: Did you ascertain the total acreage in this parcel of land immediately adjoining the right-of-way and north of the flare?

Mr. Hjelm: Just a minute. The purpose then is to show that the railroad right-of-way would divide raw land and would just affect the raw land? That is the purpose?

Mr. Goldstein: The purpose is to show how much of that land is unusable, in other words, how much of that land, as land, without reference to anything else.

Q. What is the total acreage, Mr. Humphrey?

A. One-third of an acre, designated on this map approximately south of this line here—which would [395] be construed as Unit 4 of this line here and approximately one acre north of that affected.

Q. You say an acre north?

A. An acre north. I would appraise the value of a thousand an acre, around a thousand dollars.

Q. What about the third of an acre south?

Mr. Landrum: That is before the taking, what it is worth after the taking?

Mr. Hjelm: Give the value before the taking and the value after the taking and the damages.

Mr. Goldstein: What was the value of that property as of December 14, 1938?

A. Including both parcels, here and here (indicating)?

Q. Both parcels.

(Testimony of John J. Humphrey, Sr.)

A. North and south of this line?

Q. That is what I am speaking about, these lots immediately at the flare or the right-of-way.

Mr. Hjelm: After the taking.

Mr. Goldstein: After the taking.

A. After the taking?

Q. Yes. A. Practically worthless now.

Q. What was the value of the property lying north of the flare embraced in these portions you have designated as belonging to yourself and associates which you said was a little over an acre, what was the value of that? A. After the taking?

Q. Before the taking.

A. A thousand dollars.

Q. What was the value of the third of an acre you referred to south of the flare?

Mr. Landrum: Just a moment, if the Court please. I am going to object to that on the ground and for the reason he appears to be splitting it in parcels. The question is what is the market value of the entire piece.

Mr. Goldstein: Very well. I will put it on that basis. [396]

Mr. Landrum: He can't divide it into parcels.

Mr. Goldstein: The only reason I did that, Mr. Landrum, was to show the differentiation between the map here—I will put the question this way:

Q. Taking it altogether, the entire land under discussion, what was the total acreage?

A. One thousand, one thousand, one thousand here, would be \$3000.

(Testimony of John J. Humphrey, Sr.)

Q. How much is the total acreage?

A. I imagine an acre and a half, I guess.

Q. An acre and a half in all the land?

Mr. Landrum: Three thousand dollars for an acre and a half of raw land, land in the raw! The witness understand that, that you are to give the value of the land without any platting, without a town site consideration?

The Witness: At the time of the taking or prior to that time.

Mr. Goldstein: I think if you will let the witness sit over there—I think the question would make you—

Q. Did your figure have reference to what the land was adapted for or could reasonably be adapted for use before the taking?

A. What is that question?

(The Reporter read the question.)

A. My figure includes that, it does—before the taking.

Q. You considered the adaptability of that land for general purposes? A. Yes.

Mr. Goldstein: That is the question we reserved, Mr. Landrum.

Mr. Landrum: It is all right. [397]

Mr. Landrum: That is all.

Mr. Goldstein: Mr. Miller.

VICTOR N. MILLER,

called by the defendants; sworn.

The Clerk: Please state your name to the Court and jury.

A. Victor N. Miller.

Direct Examination

Mr. Goldstein: Q. Where do you reside, Mr. Miller?

A. Boomtown, Shasta County.

Q. What is your business or occupation?

A. Real estate broker.

Q. How long have you resided in Shasta County?

A. Since 1935, in April.

Q. When you first went to Boomtown what was your official connection with the United States Government?

A. I was on duty with the army prior to coming to Boomtown in 1935.

Q. What kind of duty?

A. District Adjutant of the Army in the Redding district.

Q. District Adjutant of the Army?

A. Yes.

Q. In the Redding district? A. Yes.

Q. What rank? A. Captain at that time.

Q. You were a captain. Did you obtain a higher rank later on? A. Correct.

Q. What was that? A. Major.

Mr. Landrum: That was after you were out of the army? Were you a major in the army?

A. I am still in the army, for that matter; in the Reserve.

(Testimony of Victor N. Miller.)

Mr. Goldstein: Q. When you were in Redding in 1935 I understand you were there in connection with work as an adjutant in the army?

A. That is correct.

Q. When did you leave that particular work as an adjutant in the [398] army?

A. January 1936.

Q. In January 1936? A. That is right.

Q. And thereafter did you stay in Redding and around Boomtown? A. Yes.

Q. Further on did you engage in any other business? A. Real estate business.

Q. What was the name of that concern, realty company?

A. Central Valley Realty Company.

Q. You are married, I take it? A. Yes.

Q. Have a family? A. Yes, sir.

Q. Have you been living in that vicinity ever since January 1936? A. Yes sir.

Q. Are you one of the owners of what has been designated here, to begin with, in Parcel 1 as the Rouge tract, excepting therefrom the portion owned by Mr. Rouge and also the Van Santen property, as I will call it? A. I am.

Q. You heard the testimony of Mr. Humphrey that Mr. Kronschnabel and yourself were the other partners in that tract? A. I did.

Q. Were you living up in that territory during the time that this particular property was acquired by you and your associates?

(Testimony of Victor N. Miller.)

A. I was.

Mr. Hjelm: Acquired by whom?

Mr. Goldstein: He and his associates.

Mr. Hjelm: Oh.

Mr. Goldstein: I call your attention to Defendants' Exhibit A, which is a combination of several certified copies of subdivisions of Boomtown Unit No. 4, No. 2, No. 5 and No. 9 as filed in the office of the County Recorder of Shasta County. You are familiar with those subdivisions and maps?

A. Yes.

Q. I will ask you to state whether or not you had any connection [399] with the plotting on this map of Unit No. 4, map of Boomtown, the right-of-way of the Southern Pacific Company?

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial. The map is a recorded plat recorded up there in that county and it shows that the right-of-way is there. Whether he had any connection with it or not is immaterial. The plat is recorded. I can't see the materiality of it.

Mr. Goldstein: If your Honor please, I will say very humbly to Mr. Landrum there is no question that the map is a recorded map; but is it possible Mr. Landrum wants your Honor to believe we laid out this railroad or our men did it? We aren't trying to vary the terms of the map. That is not the purport of my question. My question has no connection with any variation of this map; but we have

(Testimony of Victor N. Miller.)

a right to explain, as far as the owners are concerned, whether or not they had anything to do with the plotting of that railroad.

Mr. Landrum: That is their own plot. They put the railroad on there.

Mr. Goldstein: If that is your claim, I will withdraw the question. If that is your claim, we plotted the railroad, we did it ourselves, without any government supervision—

Mr. Landrum: I will withdraw the objection. Let him testify to whatever he wants to.

(The question was read by the Reporter.)

A. No, sir.

Mr. Goldstein: Q. Did you at any time prior to the actual taking or the appropriation of land for right-of-way purposes through Unit No. 4 or, as it is known, as Parcel 7 here, know anything as to exactly where that right-of-way was to go?

A. I did not.

Q. Now, on the fourteenth day of December, 1933, as one of the [400] owners of the property of this particular subdivision, Boomtown Unit No. 4, I am going to ask you what in your opinion was the value of the property taken as shown on Defendants' Exhibit C in the red lines or the orange lines comprising 10.61 acres, including as it does the 50 feet shown from the flare south to the Grand Coulee Boulevard, not, however, taking into consideration any increase or increment of the value of that property as of December 14, 1938 from August 26,

(Testimony of Victor N. Miller.)

1937 by reason of the Central Valley Water Project?

A. I would like to hear the question read, please, and I would like to see the markings on the map you refer to.

(The Reporter read the question.)

A. Would you please show me the——

Mr. Goldstein: Q. In order to indicate the property, I refer to Defendants' Exhibit C showing the right-of-way embraced within these red lines, going first of all from a point marked "North Boulevard", north to a line of Lot 2 in Block 7 of subdivision—Boomtown Subdivision No. 9, then in a southeasterly direction across the right-of-way, and then south to Grand Coulee Boulevard again, including the fifty feet that is shown on this map here by the inside lines of the right-of-way—the point between the one lines being 200 feet and the outer boundaries of the right-of-way 300 feet. Do you understand the territory?

A. I believe that is the 10.61 acres, is it?

Q. The 10.61 acres.

A. I would say \$20,000.

Q. Now, Mr. Miller, in connection with the remaining property, are you familiar with the remaining property as shown by this particular tract which you and your associates owned on December 14, 1938?

A. I am.

Q. Could you indicate—in order to save time, did you hear the testimony of Mr. Humphrey giving the numbers of these lots? [401]

(Testimony of Victor N. Miller.)

A. I heard the numbers, but I could not identify them on the other side of the board.

Q. Will you just step down here——

Mr. Landrum: May I suggest—he knows the acreage?

Mr. Goldstein: Do you know the acreage?

A. Yes, Sir.

Q. I am speaking of the acreage on the other property remaining unsold.

A. I don't know the acreage. I know there was one hundred and fifty-three acres in the tract, but I could not say how many acres in here.

Q. Do you know the acreage in the balance of the property remaining that belongs to yourself, Mr. Kronschnabel and Mr. Humphrey?

A. Contiguous to the railroad?

Q. Yes.

A. I would have to estimate that. I couldn't say exactly.

Q. If you don't know, I am not going to ask you about it until you can be definite about it. I don't want any guesses.

Mr. Goldstein: Counsel, if you have no objection I will pass that for the moment.

Mr. Landrum: All right.

Mr. Goldstein: Q. In regard to Parcel No. 1 on the fourteenth day of December, 1938, were you one of the owners of what is referred to here as Parcel No. 1, the Rouge tract, which is shown in Defendants' Exhibit B in the shaded portion in orange color? A. Yes.

(Testimony of Victor N. Miller.)

Q. I will ask you if you are familiar with the lands taken, including the 50-foot strip, as shown by the line immediately east of the edge of the shaded portion and the westerly line of the right-of-way running a little north of Grand Coulee Boulevard, North Boulevard, down to the end of the section line? A. Yes.

Q. Excluding therefrom the property known as the Van Santen [402] property and also the Rouge property, which doesn't appear—a short little piece which doesn't appear on here?

A. I am familiar with that.

Q. What in your opinion was the value, fair market value, of that property comprising 3.11 acres on December 14, 1938, not including, however, any increase in value or increment to that property from the twenty-sixth day of August, 1937, up to the fourteenth day of December, 1938, by reason of the Central Valley Water Project?

A. Would you read that question please?

Mr. Landrum: That is a little different question, your Honor.

Mr. Goldstein: I think it is the same, but to make sure I will read the same language. Have you that, Mr. Kennedy? I will read the same language so there will be no——

Mr. Landrum: It may be confusing.

Mr. Goldstein: Q. What in your opinion was the fair market value of the parcel of land in this proceeding designated as Parcel No. 1, the Rouge

(Testimony of Victor N. Miller.)

Tract, as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Project?

A. Does that include, please, those lots in the 50-foot area?

Q. Yes. A. I would say \$14,000.

Mr. Goldstein: Now, in order to save time, may it be understood if I were to ask this witness the same question I put to Mr. Humphrey in regard to the date of May 9, 1938, to which the objection was sustained—

Mr. Landrum: May I have an objection to it, your Honor?

The Court: Yes.

Mr. Goldstein: We will reserve an exception to that ruling.

The Court: Yes.

Mr. Goldstein: Mr. Miller, are you familiar with the land or [403] the property immediately contiguous to the westerly right-of-way of the relocated railroad line in said Parcel No. 1?

A. I am.

Q. Can you tell this jury approximately what property, how large a property is included in the portion lying immediately west of the westerly right-of-way line of the relocated railroad in Parcel No. 1?

Mr. Landrum: Just a moment, if the Court please. I don't know whether he is intending to in-

(Testimony of Victor N. Miller.)

clude those other lots your Honor has ruled out or not.

Mr. Goldstein: No, I am not including—

Mr. Landrum: Only property contiguous to the property taken?

Mr. Goldstein: I understand your Honor's ruling was that no other property could be considered on the issue of severance except that which is contiguous and adjoining on the right-of-way itself.

Q. I mean on this side (indicating).

A. It seems to me there are six or eight lots there. I can't say exactly from here; but I can examine that and tell you exactly.

Q. Can you come up here and see?

A. Six lots.

Q. Now, just a moment, Mr. Miller. What of those lots immediately contiguous to the railroad right-of-way—or the acreage, if I may use that term was left on the fourteenth day of December, 1938, at the time of the taking of that particular portion shown there shaded?

A. If my recollection serves me right, they were all there except for five feet shown here in Mrs. Van Santen's contract, I believe.

Q. Was that a contract or a lease?

A. It was a lease with the privilege of purchase.

Q. In other words, Mrs. Van Santen has a lease on that property—on that portion of the property?

A. That is correct.

Mr. Goldstein: We will show that later on, Counsel.

(Testimony of Victor N. Miller.)

Mr. Landrum: All right. [404]

Mr. Goldstein: Q. Now, can you tell us what this property amounts to in total? I am speaking now contiguous to it. A. The area?

Q. Area. A. In acreage?

Q. In acreage, yes.

A. Oh, I judge it would be probably a little less than two acres, probably.

Q. Now you may take your seat there. What was the fair market value of those two acres after the taking on December 14, 1938?

A. It was negligible.

Q. What was the value of those two acres prior to the taking on December 14, 1938?

Mr. Landrum: Not as lots.

Mr. Goldstein: As land: I will put the question again.

Q. What was the value of that particular acreage that you just referred to, the fair market value, I will put it, designated as Parcel No. 1 and the portion you just referred to contiguous with the railroad right-of-way as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Project?

A. May I have the question read again please?

(The question was read by the Reporter.)

A. Well, I would say \$2000.

Mr. Goldstein: Again, your Honor, I desire to submit the same question as to what the market

(Testimony of Victor N. Miller.)

value of that property would be as of date of May 9, 1938 under the same circumstances and the same qualification, to which your Honor sustained the objection and it will be deemed the question is asked and the objection is sustained.

The Court: Same ruling.

Mr. Goldstein: And the defendants reserve an exception thereto. You may take the witness. [405]

Cross Examination

Mr. Landrum: Q. Mr. Witness, would you be good enough to tell the jury why you have placed a valuation of \$2000 only upon approximately two acres here when you placed a value of something like \$14,000 on three acres?

A. These lots are all broken up, if you please. They don't remain as they were originally planned, and I would not consider them the same as they were before that.

Q. Take the witness stand. This tract of land here is how many acres?

A. I believe it is three acres and a half, something like that, is it not.

Q. You placed a valuation of \$14,000 on that three acres and a fraction? A. That is right.

Q. As land? A. Yes.

Q. Adjoining it you said two acres was worth only a thousand dollars. What is your explanation to that?

A. I understood the question to be they were

(Testimony of Victor N. Miller.)

subdivided lots and Counsel asked me what I would consider as acreage, not subdivided lots.

Q. All right. I just wanted to make sure. You didn't become confused between the value of the part taken and the damage to the remainder?

A. I don't think I was confused on that.

Q. When you arrived at that opinion with relation to the reasonable fair market value of this land, did you take into consideration that it was assessed for taxes in the year 1938 at three dollars and a half an acre?

Mr. Goldstein: If the Court please, I want to object—not only object to that question but to move the Court to instruct the jury to disregard it on the ground the asking of the question is highly improper and incompetent—we don't admit the fact that it was assessed for two dollars and a half an acre, but even if that was a fact it has no bearing upon this question, upon the [406] question of condemning the land for condemnation purposes.

(Argument.)

The Court: I can reserve the ruling on that until after the recess.

Mr. Landrum: Q. Now, Mr. Miller, I understood you to say that this parcel of land was a portion of an entire tract which you gentlemen purchased of 153 acres?

A. Pardon me, are you referring now to the whole tract?

Q. Whichever it was, one of the other tracts

(Testimony of Victor N. Miller.)

which you said was a portion of a larger tract of 153 acres. A. Yes.

Q. Now, the gentleman that preceded you on the stand was named Humphrey? A. Yes.

Q. Is he one of the partners in this larger tract of 153 acres? A. Yes.

Q. This land is how far from Redding?

A. Approximately eight miles.

Q. Approximately eight miles. When did you buy it?

A. Which parcel are you referring to?

Q. This 153 acre parcel.

A. I think that was around the middle of 1937.

Q. That wasn't the tract Mr. Humphrey testified in the McReynolds—

A. There are two tracts, one is Unit 4 and one is Unit 5.

Q. Is one of those parcels a portion of that tract Mr. Humphrey testified in the McReynolds' case you gentlemen had purchased about four months ago?

A. It has no connection whatever with the McReynolds property.

Q. All right. I wanted to make sure.

Mr. Landrum: No further cross examination.

Mr. Goldstein: That is all.

Mr. Landrum: If your Honor please, Mr. Hjelm has just suggested another question. Might I be permitted to ask the last witness to [407] come up for just one further question?

(Testimony of Victor N. Miller.)

The Court: Yes.

(Mr. Miller resumed the witness stand).

Mr. Landrum: Q. Mr. Witness, I don't know whether you told us just when you gentlemen purchased the tracts of land out of which these particular pieces came.

A. Which ones, please, are you referring to?

Q. Both of them.

A. Unit 4, which you refer to, 153 acres, I believe was around the middle of 1937.

Q. Unit 4 around the middle of 1937?

A. I think that is correct. And Unit 5, the Rouge tract, was in February 1938. I think that is correct. Is that what you wanted to know?

Mr. Landrum: Yes. That is all.

Mr. Goldstein: That is all.

LELAND R. KRONSCHNABEL,

called for the defendants, Sworn.

The Clerk: Please state your name to the Court and Jury.

A. Leland R. Kronschnabel.

Direct Examination

Mr. Goldstein: Q. You have given your full name. Where is your residence, Mr. Kronschnabel?

A. Central Valley.

Q. How long have you been living up there?

A. A little over two years.

Q. I will ask you whether or not you are one

(Testimony of Leland R. Kronschnabel.)

of the owners of an undivided one-third interest in what is designated here as Parcel No. 1, referred to as the Rouge tract? A. I am.

Q. Were you such owner on December 14, 1938?

A. I was.

Q. You are familiar with the property that was taken on that date for the railroad right-of-way by the government, and including, as shown on Defendants' Exhibit B there, the shaded portion of the [408] property comprising some 3.11 acres, I believe it is? A. I am.

Q. First of all, let me ask you, are you familiar with the particular contract of Mrs. Van Santen with yourself and associates regarding one of these lots? A. Yes, Sir.

Q. What is that?

Mr. Landrum: Just a moment. What was the question?

Mr. Goldstein: Whether it is a contract or a lease.

A. It was made in the form of a lease with an option to buy in one year—

Mr. Landrum: Just a moment. Don't give any figures.

Mr. Goldstein: Don't be frightened, Mr. Landrum. I am not going to encroach—I didn't ask for any figure. I merely wanted to find out the nature of the arrangement between the owners and Mrs. Van Santen.

Q. You said it was a lease?

A. It is a lease.

(Testimony of Leland R. Kronschnabel.)

Q. With an option to purchase?

A. Yes, and the option has expired.

Q. I will ask you, Mr. Kronschnabel, as to whether or not you were familiar with that particular land from the fall of 1937 on to December 14, 1938?

A. I was, yes, Sir.

Q. By the way, did you yourself handle and take care of the subdivision known as Unit No. 5 there?

A. I did, yes, Sir.

Q. And you know the lots that were included in that 50-foot strip immediately south of Grand Coulee Boulevard running to the section line of section 31?

A. I believe I do.

Q. Let me ask you this question, Mr. Kronschnabel: What in your opinion was the fair market value of the parcel of land described and designated as Parcel No. 1, the Rouge tract, as of December 14, 1938, leaving out of consideration any increase or increment in the value—in that value—pardon me—from and after August 26, [409] 1937 due to the Central Valley Project?

A. I would say \$12,000.

Mr. Goldstein: Again, your Honor, may I at this point interpolate here I desire to ask the witness the same question verbatim, with the exception of the date of May 9, 1938?

Mr. Landrum: We have the same objection.

The Court: Same ruling.

Mr. Goldstein: We reserve an exception.

(Testimony of Leland R. Kronschnabel.)

Q. Are you familiar with the property immediately contiguous and adjoining the westerly line of the right-of-way of the relocated railroad in the Rouge tract and which is land not taken but which was there on December 14, 1938? A. I am, yes.

Q. Can you tell the jury approximately how much of that land is included—it appears in lot form, but disregarding the lots, the acreage.

A. The portion taken?

Q. The portion contiguous to the railroad right-of-way not taken.

A. Not definitely, no; I would say approximately two acres.

Q. It is approximately two acres?

A. I am familiar with it as lots.

Q. You are familiar with it as lots and you place it about two acres? A. Yes, Sir.

Q. What was the value, the fair market value, of those two acres immediately contiguous and adjoining the right-of-way after the taking on December 14, 1938? A. Very little.

Q. Has it any value at all, to be able to do anything with it? A. Yes, it has a slight value.

Q. Now, let me put this question to you, then: What was the fair market value of that parcel of approximately two acres referred to in the Rouge tract as of December 14, 1938, leaving out of consideration any increase or increment in that value from and after August 26, 1937 due to the Central Valley Project? [410]

(Testimony of Leland R. Kronschnabel.)

A. I would say \$5000.

Q. Did you understand my question, Mr. Kronschnabel, there? I had reference to this two acres?

A. If I understood the question, you asked what the value of that property was as of December 14, 1938 aside from the value caused by the Central Valley Project.

Q. I am speaking of the two acres, now. What have you in mind? I don't know whether you understood my question. Did you have the total acreage taken by the right-of-way in mind or the two acres? I am speaking of— Just strike the question for the present. I don't want to confuse the witness. What I have reference to, Mr. Kronschnabel, is this: Here is Exhibit B. Here is the shaded portion in orange, is the land actually taken for right-of-way purposes? A. Correct.

Q. By the railroad. Now, I ask you with reference to these parcels of land remaining as of December 14, 1938. You stated they would approximate an area of about two acres? A. Yes, Sir.

Q. I am asking now what the fair market value of that property, of these two acres, was as of December 14, 1938, leaving out any increase in value or increment—

A. The value of that approximately two acres?

Q. Yes. A. I would say \$5000. [411]

Mr. Goldstein: Your Honor, I desire to go back with Mr. Kronschnabel. I think there was a misunderstanding on his part of the question I asked.

(Testimony of Leland R. Kronschnabel.)

Q. Mr. Kronschnabel, since the adjournment of the Court did you look at this map and call back to your mind the question I asked you with reference to the two acres immediately contiguous to the west of the right-of-way of the railroad line and state as to what the value of that was before the taking on December 14, 1938? You remember I asked that question? A. Yes.

Q. You remember you made an answer it was \$5000? A. I did. [416]

Q. What did you include in that answer?

A. I included the area from the right-of-way to the west line there.

Q. In other words, you included the entire property?

A. Yes. I thought that is what you had reference to.

Q. Now, I am going to ask you to eliminate from your answer anything except the two acres, but not any of the property in this subdivision immediately to the south, but simply to the two acres I had reference to. A. To the street?

Q. To the street, to Grand Coulee Boulevard, this property running the entire length of the right-of-way. Now, can you state as to what the value of that property was prior to the taking on December 14, 1938 not including in that valuation any increase or increment from August 26, 1937 by reason of the Central Valley Project? A. \$2000.

Q. Now, another thing: Could you tell the jury

(Testimony of Leland R. Kronschnabel.)

about the height of the fill of the railroad at this particular tract. A. I can.

Q. About how high is it?

A. I would judge from eighteen to twenty feet.

Q. Right along Grand Coulee Boulevard?

A. The full length of the subdivision from that point south, from Grand Coulee south. [417]

Cross Examination

Mr. Hjelm: Q. You were familiar with all of this land before—or in 1937, were you?

A. Late in 1937, yes, Sir.

Q. And you testified that there were houses and so forth on the property here that you indicated?

A. I don't believe I said in 1937—if I did—at the present time, I believe I said.

Q. In 1937 there were no houses?

A. That is true.

Q. So I can get a clear picture—I didn't go up there—as I understand it, at the time you first became familiar with the property it was just brush country, range land country? A. That is true.

Q. There is no question about that?

A. Absolutely none, excepting Unit No. 9.

Q. Well, all of this property you testified to here as being your property was in that condition in 1937, wasn't it? A. That is true.

Q. We are just talking about your property.

A. Yes.

Q. I will show you Defendant's Exhibit A and ask you whether or not the name L. B. Kron-

(Testimony of Leland R. Krönschnabel.)

schnabel is your signature to the owner's certified copy? A. It is.

Q. And that when you affixed that you knew that that recited that, "We, L. B. Krönschnabel, J. J. Humphrey, Albert Rouge and Victor N. Miller hereby certify that we are the owners of the real property included within the subdivision shown upon this map, and we consent to the making of said map and subdivision as shown within the borderlines, and hereby dedicate all streets and alleys as shown upon this map for public use"?

A. I did.

Q. And that was—that was on the first day of June, 1938?

A. I believe that is correct.

Q. And I believe you testified on direct examination that you [421] handled that subdividing of Unit No. 5?

A. I did, in conjunction with my partner.

Q. And at that time—at that time when you thus had Mr. Pearl to prepare this, you knew about the streets and alleys and whatnot, how they would run? A. That is right.

Q. And you knew about the railroad right-of-way that would go through and was then planned to go through?

A. It was approved at Mr. Pearl's direction—

Q. Let me ask you this very simple question: All I am asking you and all I want from you is whether or not when you caused this plat to be

(Testimony of Leland R. Kronschnabel.)

made, whether or not then you did so in contemplation that railroad right-of-way would be where it shows on the map?

A. It was reserved——

Q. Will you answer that? Did you do so in contemplation of the railroad first being where it is shown on the map?

A. With the assumption, but not with the definite knowledge.

Q. With that assumption you did so?

A. Yes, Sir.

Q. You did so with the purpose of thereafter selling lots to people? A. That is true.

Q. And at the time that you did that, no people were residing in Boomtown in the area I am referring to?

A. At the time that was dedicated?

Q. Yes.

A. There were a few, yes, there were a few.

Q. I am talking about Boomtown people. In other words, you have testified it was range land.

A. People too, in Units 2 and 9.

Q. I am talking about Unit 5.

A. You didn't refer to Unit 5.

Q. I do so now.

A. There were people in Unit 5, yes.

Q. How long before you filed this plat?

A. A matter of several months.

Q. Had you sold lots to them?

A. Yes. [422]

(Testimony of Leland R. Kronschnabel.)

Q. And you did so in contemplation of your plotting and platting that land——

A. Yes, Sir.

Q. In contemplation at all times that the railroad would be where you have it, where you caused it to be shown on the map, is that true?

A. On the assumption it would be there, yes, Sir; no direct knowledge.

Mr. Hjelm: Well, let it go, then. Q. Now, then, you recall on direct examination that you stated that there was severance damage, consequential damage to the land owned by you that you had caused to be platted, consequential damages because of the fact you would have to go down here and under an underpass and over a certain road in order to get there? A. That is true.

Q. You knew that when you platted that land, didn't you? A. No, Sir, we did not.

Q. Did you expect you could go across the railroad right-of-way freely?

A. Exactly. So did the real estate division, otherwise——

Q. Was that the understanding? [423]

Mr. Goldstein: Just a minute. I didn't hear the answer. May we have the answer read?

(The Reporter read the last answer.)

The Witness: May I complete the answer? Otherwise they wouldn't have okayed our map for subdivision and our area——

Mr. Hjelm: Q. You needn't give me anything

(Testimony of Leland R. Kronschnabel.)

about the real estate division. Was it your expectation that the general public would be able to pass on Pensacola Street and then across the right-of-way of the Southern Pacific and thence on to Pensacola on the other side of the right-of-way? Yes or no, please?

A. Speaking of Pensacola, no. Otherwise, yes.

Q. Let us ask about the next street. Did you expect to do so with regard to Willows Street.

A. No, Sir.

Q. Did you expect to do so with regard to any other street in Unit 5?

A. Yes, Red Bluff, Chico and Main Streets.

Q. Had you made any arrangement with the railroad company to the effect you would be allowed to cross it?

A. No, Sir, they never even approached us.

Q. You know it to be a fact that no individual or the public has no right to cross railroad rights-of-way except either by permission or by purchase of a right-of-way across?

A. We assumed we had right-of-way on designated streets.

Q. Because you had plotted them?

A. That is right.

Q. Isn't it a fact you expected until the actual tracks would be laid on the ground that you might cross because the government and the railroad company would not make objection, and afterwards when trains would be going through there on up to

(Testimony of Leland R. Kronschnabel.)

Portland and so forth, you didn't expect the people you sold lots to would have a right to cross at these places, did you?

A. We definitely did. We sold them on that assumption. [424]

Q. You had held that out to your purchasers?

A. Beg your pardon?

Q. You had held that out to your purchasers?

A. Where the question arose we told our purchasers they could freely travel those roads, yes, Sir.

Q. But you did know the railroad was coming through and you had no arrangements with either the Southern Pacific or the government in regards thereto?

A. That is true, we had no arrangement. [425]

Mr. Hjelm: Q. Let me reframe it so we understand the question. In giving these values, you have given your value taking into consideration the right of ingress and egress is interfered with by the right-of-way, upon the basis that the right-of-way is interfered with?

A. I still don't get your meaning there.

Q. All right. Let us take this man here. 3.25 acres. You have placed a value there upon the basis that it is of less value now because we have cut your land in two. A. That is true.

Q. And upon the further basis that in that there is a platted town site you sustained loss to lots for resale?

(Testimony of Leland R. Kronschnabel.)

A. In this area, that would be around the right-of-way, yes, Sir.

Q. Now, you figure it would be entirely different, would you not, if you don't take into consideration resale of lots?

A. Yes, if we could justify a valuation at the present time, our figures would be higher than they are.

Q. But on the basis could it have *have* been lots such as your first saw them in 1937, then you would not claim there would be damages such as you have claimed, now?

A. They had definitely sold at figures that would justify those prices before I arrived on the scene.

Q. Before 1937? A. Yes, Sir.

Q. That was then range country, as you call it?

A. Yes, Sir. [427]

Q. That area, all of that land within thirty or forty miles of Redding was range land, wasn't it?

A. All that billy goat land, yes.

Q. That's worth approximately \$350 an acre?

A. Yes. [428]

FRANCIS E. O'CONNOR,

called for the Defendants, Sworn.

Direct Examination

By Mr. Goldstein:

A. In Redding.

Q. Where do you reside, Mr. O'Connor?

(Testimony of Francis E. O'Connor.)

Q. How long have you been residing up there?

A. About two years and five months.

Mr. Landrum: Did you say two years?

A. And five months.

Mr. Goldstein: Two years and five months.

Mr. Landrum: Thank you, Sir.

Mr. Goldstein: Q. What is your business or occupation?

A. Real estate broker and subdivider.

Q. Are you familiar with the lands in controversy here located in the Rouge tract, what is known as the Rouge tract, and also the Kelly tract?

A. Generally speaking, yes.

Q. I call your attention first of all and ask you whether or not you have had any experience yourself in connection with the buying and selling of property?

A. Considerably, Sir.

Q. For how long a period have you had such experience?

A. Seventeen years.

Q. And during that time where were the different localities where you have operated in the buying and selling of property; real property?

A. San Francisco for about fourteen years and a half and the balance of the time at Redding.

Q. Will you just speak up a little bit louder so that the last [433] juror can hear you.

A. About fourteen and a half years in San Francisco and since that time in Redding.

Q. During that period of time did you have any experience with subdivisions, sale and purchase of tracts of lands for subdivision purposes?

(Testimony of Francis E. O'Connor.)

A. Yes, Sir, I am subdividing a piece of property up there at this time, at Redding.

Q. How many years' experience did you have in the matter of selling subdivided property?

A. All during my incumbency in the business I have associated myself with subdivision work.

Q. During the year of 1938, where were you residing in connection with the particular property referred to here as the Rouge tract in Parcel No. 1 and the Kelly tract referred to here in Parcel No. 7?

A. Where was I residing?

Q. Yes.

A. I was residing in San Francisco but operating alternately in Redding. Offices in both towns.

Q. Were you at that time engaged in the real estate business?

A. Yes, Sir.

Q. And were you familiar with the sales of property that were being made? The answer will be just yes or no. In the vicinity referred to in Parcel 1 as the Rouge tract and Parcel 7 as the Kelly tract?

A. Yes.

Q. Did you yourself buy and sell property in that locality in that vicinity?

A. Yes.

Q. Are you familiar with the type and character of the Rouge tract referred to here as Parcel 1 as it was on the fourteenth day of December, 1938?

A. Yes. [434]

Q. Were you familiar with the type and character of property as it was on December 14, 1938,

(Testimony of Francis E. O'Connor.)

as far as Parcel No. 7 was concerned, referred to here as the Kelly tract? A. Yes.

Q. Mr. O'Connor, were you on the respective properties I have referred to, Parcels No. 1, the Rouge tract, and Parcel No. 7, for some time prior to the fourteenth of December, 1938?

A. Yes, for about a year and one month.

Q. And as a result of your operations there and your experience in the real estate business, did you become familiar with the values of property in that vicinity and locality as of the month of December, 1938? A. Yes, Sir.

Q. I will ask you now, Sir, what particular purposes or uses was the property referred to as Parcel No. 1, the Rouge tract, adapted for or could reasonably be adapted for as of December 14, 1938.

A. Subdivision purposes; for townsites.

Q. Is there anything else that you could state to the Jury that that property was adapted for or could reasonably be adopted for except subdivision purposes? A. Not particularly.

Q. What, in your opinion, was the property referred to as Parcel No. 7, the Kelly tract, comprising approximately 10.61 acres reasonably adapted for or could reasonably be adapted for on December 14, 1938? A. Subdivision purposes.

Q. Were you familiar with the activities and the conditions pertaining and surrounding that locality as to these two parcels on the fourteenth of December, 1938, and for some time prior thereto? A. Yes, Sir.

(Testimony of Francis E. O'Connor.)

Q. As a result of your familiarity with the premises there and the location and the adaptability for the purposes you have [435] mentioned, could you give this Jury an opinion as to the reasonable market value of these two parcels of land as of December 14, 1938? A. Yes, Sir.

Mr. Landrum: Just a minute.

Mr. Goldstein: Just answer "Yes" or "No".

Mr. Landrum: Well, but that—I don't know whether you mean just the parcels taken or not.

Mr. Goldstein: I am speaking of the parcels taken. I am only referring to the parcels taken. You could? A. Yes, Sir.

Q. Calling your attention first then to Parcel No. 1 comprising approximately 3.17 acres located in the Rouge tract, I will ask you to state what in your opinion was the fair market value of that particular tract of land referred to here as Parcel No. 1 on the fourteenth day of December, 1938.

Mr. Landrum: Just a moment, that is objected to upon the ground and for the reason that it includes within itself any increase or increment to that property due to the Central Valley Project.

The Court: The objection is sustained.

Mr. Goldstein: Q. What in your opinion—We reserve an exception, your Honor, to the ruling—what in your opinion, Mr. O'Connor, was the reasonable market value of the property described in Parcel No. 7 referred to here as the Kelly tract, comprising approximately 10.61 acres on the fourteenth day of December, 1938?

(Testimony of Francis E. O'Connor.)

Mr. Landrum: Same objection, your Honor: that—

The Court: Same ruling.

Mr. Goldstein: Take an exception to your Honor's ruling.

Q. In order to have this clear, Mr. O'Connor, I will refer to [436] Defendants' Exhibit B, Exhibit B as to the Rouge tract marked in orange color, and Defendants' Exhibit C as to the Kelly tract showing the property between the two lines, the orange lying north of Coulee Boulevard. Do you understand what I have reference to?

A. Yes.

Q. Now, I call your attention to Exhibit C and I refer you to a tract of land marked as 1.31 acres referred to here as Parcel No. 5. Are you familiar with that property? The Kronschnabel property; Parcel No. 5 referred to here as 1.31 acres shown on this map, Exhibit C, on the right hand corner?

A. I am not too generally familiar with that particular piece of property.

Q. You are not familiar.

A. Going that far back.

Q. Very well. Just these two parcels here I asked you about?

A. Yes, those parcels are more in the main section of town.

Mr. Goldstein: I believe that is all, your Honor.

Mr. Landrum: No cross examination, sir. Thank you.

Mr. Goldstein: May it be stipulated, Counsel—
What is your first name?

A Voice: Jonathan. Jonathan.

Mr. Goldstein: Your Honor, in order to save time, may it be stipulated that the witness Jonathan Tibbetts would be asked the same questions? Or else I can put him on and ask the questions.

Mr. Landrum: We are willing to stipulate that, your Honor, in order to get this lawsuit over.

Mr. Goldstein: As if I asked him the same questions as to testifying as an expert as to the market value as of December 14, 1938, and as to the objection made and the Court sustaining it and the rulings are reserved and excepted to. Just to save time.

Mr. Kennedy: That stipulation includes he would qualify if [437] he took the stand as a real estate expert?

Mr. Landrum: Certainly, certainly.

Mr. Goldstein: Yes, and his testimony would be to the same effect.

ALBERT ROUGE,

called for the Defendants, Sworn.

Direct Examination

By Mr. Stimmel:

Q. Will you state your name, please?

A. Albert Rouge.

Q. Now, how old are you, Mr. Rouge?

(Testimony of Albert Rouge.)

A. Fifty-seven.

Q. Where do you now reside?

A. Well, Central Valley.

Q. When did you first become familiar with Central Valley; the territory surrounding Central Valley, Mr. Rouge? A. 1911.

Mr. Landrum: I didn't hear that answer.

The Reporter: 1911.

Mr. Landrum: 1911. Thank you.

Mr. Stimmel: Q. And since that time, Mr. Rouge, have you been familiar with the locality of Central Valley and the surrounding country?

A. Yes.

Q. If the Court will bear with me I want to find the map of the parcel of Mr. Rouge's property. You are the Albert Rouge whose name is used when referring to the Rouge tract? A. Yes, Sir.

Q. I will ask you, Mr. Rouge, when did you acquire the property known as the Rouge tract?

A. When I did? [438]

Q. When you acquired it; when you bought it.

A. In 1921, the ninth of December.

Q. And you have owned that tract of land ever since and until you have sold portions of it out, is that correct? A. Yes, Sir.

Q. Now, Mr. Rouge, so that—

Mr. Landrum: Could I interrupt just a moment? We have a disagreement here as to that date. Some of them say '31 and some of them say '21. Which is it?

(Testimony of Albert Rouge.)

The Witness: '21.

Mr. Stimmel: '21.

Mr. Landrum: All right.

Mr. Stimmel: Q. In order to make this clear for the record, I would suggest that we designate the portion——

The Court: Would you mind swinging the board around so that the jurors can conveniently see it?

Mr. Landrum: This way, your Honor?

The Court: Yes, thank you.

Mr. Stimmel: Yes. The portion marked in orange or red as Parcel A of Parcel 1 and the blue as Parcel B, so the record may be clear. You have no objection, I understand?

Mr. Landrum: No, go right ahead, Mr. Stimmel.

Mr. Stimmel: So that he will be familiar with it. This portion of your property was excluded from the Boomtown No. 4 subdivision by you?

A. Five

Q: Five. Thank you. Do you have any property lying in this area (Indicating)?

The Court: For the purpose of the record I think you had better designate that as either east, north or south.

Mr. Stimmel: Northerly; northerly of Willows Street on this [439] map, Defendants' Exhibit E.

The Witness: You mean on the northeast of the section; on the northern part of the section?

Q. North of Willows Street here. Do you see Willows Street? Would you like to come down?

(Testimony of Albert Rouge.)

A. About 270 or 280 acres.

Q. How many? A. 280 acres.

Q. 280 acres lying back and northerly of Willow Street. According to—Now, I will ask you, Mr. Rouge, in the platting out of this map, there appears to be a 15 foot lane 125 feet long abutting upon your property A and B on Parcel No. 1. Is that correct? A. Correct.

Q. And this property of A abuts on Main Street? A. Main Street.

Q. A dedicated street, is that?

A. A dedicated street.

Q. Now, in your opinion, Mr. Rouge, what was the fair market value of the parcel of land containing .047—.047 acres on—described as colored in red or orange here, as of December 14, 1938, excluding therefrom any enhancement or implement by reason of Central Valley Project from and after the twenty-sixth day of August, 1937?

A. I estimate that be \$700.00.

Mr. Landrum: Seven hundred?

A. \$700.00.

Mr. Stimmel: Q. Now, by reason of this taking of this portion, Parcel A, what damage, if any, has been suffered by the remaining portion of the land as B, Tract B, described in blue?

A. It cuts off—

Mr. Landrum: Just a moment, now, that is objected to, if the Court please, as not responsive to

(Testimony of Albert Rouge.)

the question. He asked the [440] question how much that blue tract had been damaged.

The Court: Yes.

Mr. Stimmel: I think, your Honor, the witness does not understand.

Mr. Landrum: No, I am sure he doesn't.

Mr. Stimmel: I agree with the objection, your Honor. Will you repeat the question again, please?

The Court: Listen to the question, Mr. Rouge.

Mr. Stimmel: Listen to the question, Albert.

(The question then was read by the reporter.)

The Witness: I would say \$3000.00.

Mr. Stimmel: Q. Would you state in your opinion as to what this area including A and B is adaptable for or was adaptable or reasonably could be expected to be adaptable for on the fourteenth day of December, 1938, and the different uses for which it was adaptable? A. Well, business—

Mr. Stimmel: Now, do you understand what I mean when I say adaptable? A. Yes.

Q. If you don't understand me, I wish you would say so that we could proceed.

A. Well, to what it would be adaptable?

Q. Yes. What it could be used for. What are the purposes, in your opinion, the uses to which that property would be put? In other words, what were the best uses for that property on December 14, 1938? A. It could be cut into lots.

Q. Let me ask you this question: You have

(Testimony of Albert Rouge.)

considerable land in this area and I think you started to answer that question and I stopped you.

[441]

The Court: You want to designate what kind of lots; country lots or city lots or suburban lots.

Mr. Stimmel: Q. The lots that you mean, do you mean city lots or country lots?

A. Well, that could be done but it is impossible now because this has come.

Q. You mean by taking this Parcel A it has shut off the remaining portion of that land, is that what you mean? A. That is what I mean.

Q. Now, did you say that if this had not been taken this was adaptable for business property?

A. Yes.

Q. Is that the way I understood you?

A. Yes, Sir.

Q. Now, does it have any other use in addition to that?

A. To be sold for communication for the rest of the property.

Mr. Stimmel: I think that's all the questions I have to ask the witness at this time, your Honor. I reserve the right to ask him any further questions if I overlooked anything.

Cross Examination

By Mr. Landrum:

Q. Mr. Rouge, will you step back down here, please? A. Yes.

(Testimony of Albert Rouge.)

Q. I want you to be very careful so that we won't make any mistake about this. Now, I want you to step back so that the Jury can see where I am pointing. I want you to tell the Court and Jury whether or not you are the owner of the little 15 foot lane you have referred to?

A. I am not the owner.

Q. You are not the owner? A. No, Sir.

Q. Were you the owner?

A. I was the owner.

Q. When did you dispose of it?

A. On the fourth of February, [442] 1938.

Q. On the fourth of February, 1938, you sold that little 15 foot lane to some one?

A. No, I sold a 64 acre tract to Miller, Humphrey and Kronschnabel.

Q. And those are the same gentlemen who have appeared here in this court room in the trial of this lawsuit, are they not? A. Yes.

Q. And they bought a little 15 foot strip there from you, didn't they; 15 foot strip?

A. No, Sir. they bought the tract complete. 64 acres.

Q. But in buying that from you—look at the map now, I don't want to confuse you—they kept you from running a street right down here which would have given you plenty of connection and not been cut off, didn't they?

A. I cannot see that.

Q. Now, Mr. Witness, let me ask you, you claim,

(Testimony of Albert Rouge.)

do you not, that because the railroad right-of-way is down here that it cuts this land off from access to Grand Coulee Boulevard, don't you?

A. Yes, Sir.

Q. All right. Now, if you had run a street right on here like I am showing you, you wouldn't have been cut off, would you? A. No.

Mr. Landrum: Thank you, Sir.

A. But then——

Q. That's right.

Mr. Goldstein: Let him answer the question.

Mr. Landrum: You sold that piece and when you sold it to them you cut yourself off, didn't you?

A. No, Sir, I still retained a strip of land down Grand Coulee Boulevard. [443]

Q. Yes, but, Mr. Rouge, you sold the land to which I am pointing on Defendants' Exhibit E to Humphrey, Miller and Kronschnabel, did you not?

A. Yes.

Q. And you sold it to them in February, 1938?

A. '38.

Q. Yes, and if you hadn't sold it to them you could have driven to the point to which I am pointing on Defendants' Exhibit E and driven right over to Grand Coulee Boulevard if there had been a thousand railroads there, couldn't you?

A. Well, I might have done it or I might not have done it.

Q. All right, Sir. Now, I am not through with you. I have got a couple more questions I want to

(Testimony of Albert Rouge.)

ask you. Mr. Rouge, your name is Albert Rouge?

A. Yes, Sir.

Q. I want to show you a document which I have here and I am going to ask you to examine it and state whether or not that is your signature on there.

"Albert Rouge". A. It is.

Q. Albert Rouge. A. Yes, Sir.

Q. Now, will you look up here and tell me what the date of it is?

A. The date, California, November 2, 1937.

Q. Now, Mr. Rouge, there has been some testimony here with relation to when the United States Government first undertook to purchase property from you. This is the option that Mr. Mellin talked about, isn't it? A. Yes, Sir.

Q. Thank you, Sir.

Mr. Stimmel: May I see it?

Mr. Goldstein: Let him explain that.

Mr. Landrum: Yes, it will need some explanation.

Mt. Stimmel: No, I think that is going to be very clear.

Mr. Landrum: I am not even going to try to introduce it. [444] I don't think it is admissible.

Mr. Stimmel: Well, I think we would like to have it introduced, your Honor, I think in all fairness to this witness.

Mr. Landrum: There certainly is no objection. We will have it marked and I will offer it, if you like.

(Testimony of Albert Rouge.)

Mr. Stimmel: Please.

The Clerk: Your exhibit? Plaintiff's?

Mr. Landrum: Yes, Sir.

The Clerk: Plaintiff's Exhibit No. 6.

Mr. Stimmel: Well, if the Court please, the option is, of course, inadmissible, but as long as it has been questioned, we will withdraw the objection of its inadmissibility because we would like to go into the situation.

Mr. Landrum: I didn't know you had objected to its admissibility at all. Now, if your Honor please,—

Mr. Stimmel: Well, I am waiving any question of admissibility.

Mr. Landrum: All right. May I state to the Court the purpose for which I offered that? If your Honor please, there has been some argument here with relation to when this project started and your Honor will recall that they brought out on cross examination of Mr. Mellin that very document and it is for the purpose of showing something that they opened the door for on cross examination that I am going through it. I offered that simply and asked this witness this: "Is this your signature; what is the date of it, and is that the option that Mr. Mellin referred to?" That's the question. Now, if Counsel wants to put it in for something else, he can put it in as my exhibit or his exhibit—

(Testimony of Albert Rouge.)

Mr. Stimmel: I will explain to the Court the reason for putting this in. [445]

The Court: Well, isn't that over the bank now? It is in evidence.

Mr. Stimmel: Well, if the Court please, Counsel has suggested——

Mr. Landrum: May I say that——

Mr. Stimmel: I understand the reasoning and I think I should reply to him.

Mr. Landrum: May I say that I am still examining the witness, your Honor. May I be permitted to read this instrument to the Jury? Ladies and Gentlemen of the Jury, I now will read to you what has been marked as

UNITED STATES EXHIBIT No. 6

“Redding, Calif., November 2, 1937.

Bureau of Reclamation, Redding, Calif.

Attention: Mr. Snell.

In re: the small parcel of land that will be required for a right-of-way for the relocation of the Southern Pacific R. R. out of the extreme southeast corner of Section 25 in Township 33, North, Range 5 West, of Mt. D. B. M. in Shasta Co., Calif., I offer to sell to the Government this small parcel of land approximately 2 acres, more or less, for the sum of \$100.00 cash. I will supply a certificate of title insurance showing perfect title in me at the time the same shall be conveyed to the Govern-

(Testimony of Albert Rouge.)

ment and will make and deliver a good and sufficient deed acceptable to the Government for this parcel of land.

I will allow a period of six months' time for the Government to perfect their acceptance of this offer.

(Signed) ALBERT ROUGE."

Mr. Landrum: No further cross examination.

Redirect Examination

By Mr. Stimmel:

Q. Mr. Rouge, who did you have the negotiations with?

A. Mr. Stafford. [446]

Q. And do you know who Mr. Stafford is?

A. Yes, he is working for the Reclamation Bureau.

Q. How did it come about that this instrument was signed by you?

A. Well, I came down from Washington. They wanted to buy the twenty acres for the septic tank and sewage. And then Mr. Stafford told me, "We don't know yet where the railroad is going to go, but in case that the railroad would take a second or third way," the one—the way it is going now,— "well, we should like to buy from you the corner there." It is right close to the corner of the section. That's pretty far. It won't hurt you. So, I told him, "That's all right, I will—I will offer to sell to the Government for \$100.00 if they want

(Testimony of Albert Rouge.)

it." But then at the time they didn't know yet or nobody knew where the railroad was going to go and that was the condition between Mr. Stafford and me.

Q. Then what happened?

A. About two months or three months after he came to me and he told me, "Well, they won't need it, anyway." So, that's all right. And then I tell him, "Well, now the railroad consequently will have to deal with Mr. Krönschnabel." That was after the fourth of February of 1938. [447]

Mr. Stimmel: Q. Now, Mr. Rouge, when this was made up—this was a part of the transaction in connection with the buying of the septic tank property, wasn't that correct?

The Court: Maybe you better let the witness explain himself without suggesting.

The Witness: The buying of the septic tank is a separate thing.

Mr. Landrum: Separate thing. That is what I am saying.

Mr. Stimmel: Q. Do you mean by a separate thing, do you mean another location, or they started to buy both of these at the same time, or the septic tank is separate from this option, is that what you mean? A. Yes.

Q. And this deal on the land was a part of the appropriation for the purpose of the septic tank location, is that right?

The Court: He didn't say that.

(Testimony of Albert Rouge.)

Mr. Landrum: I object to the question as leading.

The Court: Sustained.

Mr. Stimmel: If the Court please, I don't quite understand——

The Court: If you will let the witness explain.

The Witness: It was two different transactions.

[452]

Mr. Stimmel: How far apart——

Mr. Landrum: If the Court please, I object to any further questions on that line on the ground and for the reason he is impeaching his own witness. His own witness has stated it was two separate transactions. Now Counsel is trying to force his own witness to——

Mr. Stimmel: No, I am trying to find the facts and present them to the Court here.

The Court: I think it would be better for him to tell about the first transaction and then tell about the second transaction, when you have finished with the first. What did Mr. Stafford say to you when he came to see you the first time?

A. Well, we spoke first of the septic tank.

Q. Of the septic tank?

A. And then about the second survey for the railway. They didn't know exactly where the railroad was going to go and he told me, "These two acres here near the corner of your section, the southeast corner, that is close by, it isn't very far from the corner, and if you want to sell it we

(Testimony of Albert Rouge.)

should be glad to buy it. How much would you ask for it?" "Well," I told him, "that doesn't cut me off. You may have it cheap enough. Let us say about a hundred dollars." He says, "All right." And then I wrote this paper. That was the day after or the second day after we made a transaction for the septic tank. [453]

Mr. Stimmel: All right, go ahead.

A. Then I told him, "That is all right. I will offer that parcel for \$100.00; but then it is understood only in case the Government wants it." That is all.

The Court: Q. Only in case the Government wants it?

The Witness: Wants it or not.

Mr. Stimmel: Q. When did you learn from the Government—

Mr. Landrum: That is objected to upon the ground and for the reason he hasn't learned anything from the Government.

The Court: Sustained.

Mr. Stimmel: All right; I will withdraw the question—beg your pardon, your Honor has ruled.

Q. When did you learn for the first time that the Government did not desire this option?

A. I cannot say exactly the date, but I met Mr. Stafford a few times. It was again in February or in March, in the month of [457] March, he told me, "Well, we won't need it."

Q. What year was that?

(Testimony of Albert Rouge.)

A. 1938. And then I answered him, "It is all right, then, and consequently the railroad will have to deal with Mr. Kronsehnabel."

Q. Now, when did you sell this portion of the land known as Boomtown No. 5 subdivision to Mr. Kronsehnabel, and Miller and Humphrey?

A. On the fourth day of February, 1938.

Q. Was that after you learned from Mr. Stafford that the Government did not want the option?

A. No. Mr. Stafford told me that day about maybe a month after—in March sometime or the end of February—

Q. Let me get this clear. Mr. Stafford told you in March or the end of February that the Government did not want the option? A. Yes, Sir.

Q. And then after that did you sell to Mr. Kronsehnabel?

A. I have sold already to Mr. Kronsehnabel.

[458]

ELMER H. JOHNSON

Direct Examination.

Mr. Stimmel: Q. Mr. Johnson, how long have you resided at Central Valley?

A. Since June 8, 1937.

Q. I will ask you if you are one of the owners of Parcel No. 4 described in the complaint in this action, which embraces the portion of Exhibit A

(Testimony of Elmer H. Johnson.)

outlined by an exterior border of blue, which includes a portion set off by red lines and designated as the portion within the property taken for railroad purposes by the plaintiff in this action?

A. I am.

Q. I will ask you what was the market value of the portion of land taken by this proceeding by the Government for railroad purposes embraced within the red lines, being 4.81 acres, on December 14, 1938, excluding therefrom any increase or increment by reason of the Central Valley Project from and after August 26, 1937.

A. \$600.00 an acre.

Q. I will ask you, Mr. Johnson, what was the damage or detriment caused to the remaining portion adjoining both sides of the right-of-way, the northerly portion being 6.1 acres and the southerly portion consisting of 6 acres, at that time. [464]

The Witness: Repeat that question again, please?

Mr. Stimmel: May I have it read, your Honor?

The Court: Read the question, Mr. Reporter.

(The Reporter read the question.)

A. \$7,000.00.

Mr. Stimmel: Q. At the time of the taking and at the time of the purchase and on August 26, 1937, for what purposes was that land adaptable?

A. Subdivision purposes.

Mr. Stimmel: That is all.

(Testimony of Elmer H. Johnson.)

Cross Examination

Mr. Landrum: Q. Mr. Witness, I think that just before the recess I asked you whether or not in giving us the figure that you did with relation to the damage to the remainder of your property you gave to us the full value of that property.

Mr. Stimmel: Now, just a minute; may I understand this question? You are referring to the northerly portion, north of the right-of-way?

Mr. Landrum: If the Court please, as I understand the measure [465] of damage, it is the difference in value of the remaining property between what it was before the taking and after the taking. I am trying to find out from the witness whether that is what he gave us.

Q. Is that correct, Mr. Johnson, that you gave us the full value of this property?

A. I did not.

Q. I notice that you have referred to the fact that this piece by virtue of the taking of the portion which I am pointing to on this exhibit (indicating)—you have left approximately 6 acres here (indicating)?

A. Correct.

Q. And you have 6 acres here, that is correct, isn't it?

A. Yes.

Q. Is that the land you are talking about?

A. It is not.

Q. I don't want to confuse you, Mr. Johnson. In answer to Counsel's question—He asked you

(Testimony of Elmer H. Johnson.)

how much you had been damaged to the remainder of your property because the United States took this strip here, didn't he (indicating)?

A. Yes.

Q. In answer to that question you stated \$7,000.00, didn't you?

A. Correct.

Q. Now, were you at that time referring to the 6 acre piece to which I point here and the 6 acre piece to which I point here? Is that correct?

A. Correct.

Q. And you said that that which we took, to which I am pointing here, was worth \$600.00 an acre?

A. Correct.

Q. 6 acres here and 6 acres here make 12 acres which you said was damaged \$7,000.00, didn't you? Is that right? Six times twelve is seventy-two, isn't it? Is that right? [466]

A. Explain that question again, please.

Q. I don't want to confuse you. You said your damage because we took this strip out of the entire strip to which I am pointing, you said you were damaged \$7,000.00?

A. Yes.

Q. And what we left to you was 12 acres?

A. Correct.

Q. So you are figuring nearly \$600.00 an acre damages on land which you still have, is that right?

A. \$7,000.00.

Q. Yes. Six times twelve is seventy-two, isn't it? Practically the same, is it not?

A. Almost \$200.00.

(Testimony of Elmer H. Johnson.)

Q. Yes. Now, of course, Mr. Johnson, you have all this land still left? That is all adjoining right on your platted property, isn't it? A. Yes.

Q. Now, is your land to where I am pointing on this exhibit damaged by reason of the fact the railroad runs up here (indicating)? A. Yes.

Q. How?

A. Well, it lies in close, right next to it.

Q. Let me ask you: Your land is what is referred to as the 7 acre tract—You don't know where the bus went down with this Jury, do you?

A. I imagine it went right up on the right-of-way.

Q. Well, if they came in from here and along between your tract of land and Mr. Kronschnabel which is designated as tract No. 5, they would be going right down to look at the land you had remaining, would they not? A. Yes.

Q. It would be your land they started down to look at when the bus stopped here (indicating)—Mr. Stimmel is your lawyer? A. Yes.

Q. All brush, isn't it? All brush? [467]

A. Brush—a lot of nice trees there, too.

Q. Now, if the Jury came down this railroad track, Sir, and stopped along in here, and stopped on the line between your land and Mr. Kronschnabel's Tract No. 5 and looked across the tract, they would be looking right at the land you say was worth \$600.00 an acre, wouldn't they?

A. Correct.

(Testimony of Elmer H. Johnson.)

Q. Mr. Witness, let me ask you this: I understood you to say you came up to the Central Valley Project on June 8, 1937, is that correct?

A. That is correct.

Q. Where did you come from?

A. From the State of Montana.

Q. From Fort Tech? A. Yes.

Mr. Landrum: Q. You came here from Montana, is that right? A. Correct.

Q. How long had you been in Montana?

A. About twenty years.

Q. You left there to come out here to the Central Valley, that is correct? A. Yes.

Q. Yes, yes. Now, Mr. Johnson, for the benefit of the Jury, I want you to tell us what kind of land this is in here to where I [468] am pointing on this exhibit? Is it the same kind of land as it is over here I am pointing to?

A. That land lays higher there than this.

Q. It is nothing but a bluff with high trees on it, isn't it?

A. No, it makes nicer residences; it overlooks the Cascade Mountains there, and makes nicer residences.

Mr. Landrum: This land down in here, Sir, is more level than this, isn't that right?

A. Yes, Sir.

Q. But you say because the Government in connection with the Central Valley Project put the railroad through there you have been damaged as

(Testimony of Elmer H. Johnson.)

much per acre for, this land that you still have, you are damaged by the Government taking this for the project, that is right, as much per acre as it is worth? A. Not exactly.

Q. Well, \$200.00 difference?

A. That is right. [469]

Redirect Examination

Mr. Stimmel: Q. Mr. Johnson, will you explain to this Jury how after the construction of this railroad right-of-way in there, what access did you have to the portion lying northerly of the railroad.

A. Not any at all.

Q. Will you tell the Jury why you haven't any approach to the northerly portion of this property across the railroad?

A. Well, there is no way of getting out—there is no way of getting around it.

Q. Is there any cut or fill?

A. Yes, a large cut through that—through the center of that, on this end of it is a fill.

Q. There is a fill here? A. 25 foot fill.

Q. On the southerly portion?

A. No, that would be the northwest portion.

Q. In this locality (indicating)?

A. It cuts right in there where you have your finger, on this side, and the fill is on the other, northwest. [470]

Q. Now, I will ask you this question, Mr. Johnson: It is your statement, your opinion, that by reason of the construction of this right-of-way in

(Testimony of Elmer H. Johnson.)

the manner proposed and being constructed, of the railroad, that your damage to the remaining portions of this land is \$7,000.00? A. Correct.

[471]

Q. Mr. Johnson, I will ask you, have you any approach from the broken portion of your land south of the railroad right-of-way to that portion north, through, over and across your subdivision or land, being the southerly portion south of the railroad right-of-way to the northerly portion of your land intersected by the railroad right-of-way?

Mr. Landrum: We are perfectly willing to admit, Mr. Johnson, he can't cross that railroad track

[472]

Mr. Stimmel: One more question. I want to propound to the witness this question, and I will instruct the witness not to answer it until Mr. Landrum has an opportunity to have a ruling on an objection: Q. Mr. Johnson, what in your opinion was the fair market value of the parcel of land containing 4.81 acres within the right-of-way proposed to be taken by the Government for right-of-way purposes on December 14, 1938?

Mr. Landrum: That is objected to upon the ground and for the reason it is improper as to form in that it doesn't exclude from the answer any value due to the Central Valley Project.

The Court: Objection sustained.

Mr. Stimmel: That is all. May we also have the stipulation that if we called the witness O'Connor

(Testimony of Elmer H. Johnson.)

and propounded the same question as to the value of this land as of December 14, 1938, that the witness would be qualified to testify as an expert, and that it will be the same objection and same ruling and same exception? I believe I took an exception to that last ruling, but if not, may it be considered I have?

Mr. Landrum: It may be so stipulated.

Mr. Stimmel: And that the exception is taken in the record? Is that clear, your Honor?

The Court: Yes. It is clear. So ordered.

Mr. Stimmel: That is all. [473]

MRS. FLORENCE VAN SANTEN,

called by the Defendants, Sworn.

The Clerk: Will you please state your name to the Court and Jury?

A. Florence Van Santen.

Direct Examination

By Mr. Goldstein:

Q. Where do you reside, Mrs. Van Santen?

A. Central Valley.

Q. Will you please speak up so that the ladies and gentlemen of the Jury can hear you. I will ask you whether or not on the twenty-third day of April, 1938, you made and entered into an agreement with Messrs. Kronschnabel, Miller and

(Testimony of Mrs. Florence Van Santen.)

Humphrey relative to a lot known as Lot 2 of Block 11 of Boomtown Unit No. 5 of [475] Central Valley?

A. Yes, Sir, I did.

Q. Referring to Government's Exhibit No. 3, it shows Lot 2 on this map right in the Rouge tract, is that correct?

A. Yes.

Q. Is that located right on Coulee Boulevard?

A. Yes, Sir.

Q. I will show you this agreement and ask you if that is the agreement that you made at that time in connection with that Lot No. 2.

A. It is.

[476]

The Court: Mr. Landrum is willing to stipulate, however, she has an interest in the property by virtue of the lease, and are you also willing to stipulate as to the term?

Mr. Landrum: To which it was to extend? [477]

The Court: Yes.

Mr. Landrum: Why, certainly. The only thing I don't want Counsel to do is to bring something before the Jury—which he knows he is trying to do—

Mr. Goldstein: I am not trying to do anything. I think I am sincerely offering my offer of proof.

The Court: In view of the offer made by Mr. Landrum, the objection is sustained.

Mr. Goldstein: May I have this marked for identification as Defendants' Exhibit next in order, so I can identify the document I offer, and it is understood, then, the objection to the offer of the document is sustained?

(Testimony of Mrs. Florence Van Santen.)

The Court: In view of the proposition made by Mr. Landrum, it is sustained.

(The document referred to was marked Defendants' Exhibit G for identification.)

Mr. Goldstein: Q. Now, Mrs. Van Santen, what was the size of that piece of property, the size of that lot?

A. Well, it has a point on it, it runs to a point in the back, but we figured we had 75 foot frontage, I think.

Q. On Coulee Boulevard? A. Yes.

Q. How far back does it go?

A. It was better than a hundred feet.

Q. What kind of a lot was it, what shape?

A. Well, it was shaped like a wedge, I would say, it runs to a point in the back. One side is perfectly straight and the other is cut off and runs to a point.

Q. On the fourteenth day of December, 1938, did you have that property improved, had improvements on it? A. I did. [478]

Q. I will ask you this, as to whether or not at that time you had a lease on that property for approximately ten years? A. Yes, Sir.

Q. It has been stipulated here there was an option on that to purchase, but which was not executed—you didn't exercise that option?

A. Not at that time. [479]

DAVID WILSON AGNEW,

called by the Defendants, Sworn.

The Clerk: Will you please state your name to the Court and Jury?

A. David Wilson Agnew.

Direct Examination

By Mr. Kennedy:

Q. You have given your name. A. I have.

Q. What is your age? A. Fifty-nine.

Q. Beg pardon? A. Fifty-nine.

Q. Where do you reside, Mr. Agnew?

A. Central Valley.

Q. How long have you resided in Central Valley?
A. Since August 3, 1938.

Q. And prior to residing in Central Valley where did you live? A. San Francisco.

Q. How long did you live there?

A. Approximately fourteen years.

Q. Mr. Agnew, you are the defendant in this action named in the complaint? A. I am.

Q. And how long have you owned the piece of property described in the complaint, which I just read in my questions to Mr. Mellin?

A. Since June of 1938.

Q. What date? A. June of 1938.

Q. At the time you bought that property was it improved? A. It was not.

Q. At the time you bought the property would you describe to the Jury the general surrounding

(Testimony of David Wilson Agnew.)

business conditions there as to population and location of other buildings?

A. Well, on the hill there was very little—in fact, there was no business at all on the hill where these buildings are located. Down on Grand Coulee there were some businesses; I would say [492] approximately 75 per cent of what is there now, and there was residences scattered all over the territory.

Q. Do you recall or know approximately what the population of Central Valley was when you bought there?

A. It was estimated around two thousand people.

Q. How far is that place from what is known as the Government Camp or Summit City where the Government has its headquarters and camp?

A. Practically one mile.

Q. Now, when you bought this property, Mr. Agnew, will you state whether or not you observed any stakes indicating a proposed right-of-way for a railroad through the right-of-way now shown on that map?

A. I did not.

Q. When you purchased the property—In June, was it, 1938?

A. June, 1938.

Q. Did you have any knowledge or understanding that there was to be an underpass constructed on what was called Grand Coulee Boulevard?

A. I did not. No one seemed to know where the railroad was to be located or the elevation or anything about it.

(Testimony of David Wilson Agnew.)

Q. Now, did you after purchasing the property improve it? A. I did.

Q. Will you state what you did in regard to improving it?

A. Well, on Lots 1, 2 and 3 I erected a building 60 by 80 feet with an extension on the rear of 8 feet by 32. I dug a well, put up a tank, water system, and put in a septic tank.

Q. Now, Mr. Agnew, what is the height of the building? Can you describe the dimensions in that respect?

A. The ceiling is a 10 foot ceiling, and the height from the ceiling to the center of the rafters is 14 feet. It would be about 24 feet high—that is, at the front, and the rear would be about 34, because of the elevation— [493]

Q. What was the general nature of the building? I mean, what was it used or to be used for?

A. For a dance hall.

Q. And you remember when it was completed?

A. It was completed on the fifth of November, 1938.

Q. That is, the building?

A. It was completed on that date and we opened on that date.

Q. Now, Mr. Agnew, you spoke of also digging a well there and putting up a tank. Will you describe your experience and work in locating and digging that well?

(Testimony of David Wilson Agnew.)

A. Well, we had a contract with well diggers, supposed to be——

Q. Never mind what you supposed.

A. They were hard rock miners, what they were, to dig the well. And they located the source of water as best they could and the well was dug. They went down——

The Court: It is rather a question of cost rather than mechanics of the thing.

Mr. Landrum: Now, if the Court please, it is the Government's position the cost is immaterial, not going to the measure of damages, and I think Counsel agrees with me, do you not?

Mr. Kennedy: I would answer Counsel by saying I agree that is a general rule, but we have a well established rule in California that structural cost is admissible when there is no other—I mean in certain cases when they may be the only way that the Court could get at the value of the property. Do you agree with that, Mr. Landrum? I am referring to the recent case in 218 Cal. 198. However, I am not asking this witness as to the cost at this time, but I don't want to be shut out from doing it by Counsel's statement of law.

Q. Now, will you go ahead and describe what you did about this [494] well.

A. Well, they went down about 14 or 16 feet when they hit this blue serpentine rock.

Q. You were present yourself all the time this work was progressing?

(Testimony of David Wilson Agnew.)

A. Yes. And at that time we had to get a crew with a compressor to drill the rock and shoot it, and the men who originally contracted for the well kept the rock cleaned out. The well was dug to a depth of approximately 74 feet.

Q. Now, Mr. Agnew, I will ask you at this time—without diverting from the subject—how far is the well now located from the line of the proposed right-of-way for the railroad?

A. Approximately 51½ feet. There is a difference between the line that the Government fenced and the survey the County surveyed. There was so many feet taken off the rear of my land which brings it to about approximately 2 feet this side—closer to the building than the fence showed. There is that much difference between the Government survey and the County survey.

Q. At the time you dug that well—and referring to the map, Exhibit C on the board here, if you need to refer to it—how far was it your understanding at that time that your well was from the proposed railroad right-of-way?

A. Approximately 55 feet from any line they might use.

Q. In other words, the map at that time showed Lot 4 behind your property giving you an additional 50 feet distance from any—

Mr. Landrum: He didn't own Lot 4.

Mr. Kennedy: I agree to that, but I mean—

A. It did.

(Testimony of David Wilson Agnew.)

Mr. Kennedy: Was that question finished? If the Court please, may I have the question read? [495]

The Court: Yes.

(The reporter read the last question as far as propounded.)

Mr. Kennedy: I will withdraw that question, I think, because it is confusing to the witness. If your Honor please, could I ask the reporter to read the last question and answer preceding that?

The Court: Yes.

(The reporter read the last preceding question and answer.)

Mr. Kennedy: Q. I will ask you also, Mr. Agnew,—you haven't finished, I believe, as to the well. You dug it to a depth of 74 feet?

A. Approximately 74 feet.

Q. State what the water conditions were as you dug it, or afterwards?

A. When we got down to about 65 feet we hit water, and it was—the hole was drilled diagonally—that is, on an angle from the corner of the well—we hit water in there, and the hole was drilled about 4 feet. They hit water in there. They drilled four more holes around that and shot, and there was no more water; it was supposedly sealed off from the blasting. We went on down to a depth of 74 feet and there was a little water in there, but very little, and we gave it up.

Q. Subsequently what if anything developed in

(Testimony of David Wilson Agnew.)

the way of water supply there?

A. It did. When the rain set in for the winter we set eaves troughs on the building running into the well for use of the well.

Q. That is to say you used the well as a cistern in connection with the carrying on of your business?

A. I did. In the spring,—that is last spring—we used water out of the well until we got down to a depth—during the summer the water stood in the well there from 8 to 10 feet all summer. [496]

Q. Water in the well now? A. There is.

Q. Approximately how much?

A. Approximately 60 feet in there now.

Q. Now, first of all, state the distance at the rear of your building which you described is now located with respect to the proposed right-of-way line of the railroad company along the back of your property.

A. The closest point, you mean, or the—

Q. Yes; tell the Jury how the situation is.

A. Well, there is a back stairway leading from the building to a cement platform at the foot of the stairs. At that distance from the line to the platform, is about five feet and a half.

Q. And the same condition or facts—

A. I think that is about five feet and a half.

Q. You mentioned a moment ago at the time you started building there was also a lot behind you.

(Testimony of David Wilson Agnew.)

between you—along the—between you and the proposed right-of-way? A. There was.

Q. You also spoke of digging a septic tank. Where is that located?

A. That is located in the northeast corner of Lot 3.

Q. Perhaps the Jury doesn't know the lot numbers. Could you point it out. .

A. That would be in the upper right hand corner of the plot there.

Q. Can I lead the witness to say that is the upper lot of the three lots here? (Indicating.)

A. Yes.

Q. And the septic tank is in the upper—you say upper right hand corner? A. Yes.

Q. And how far is that septic tank now located with regard to [497] the line of the proposed railroad right-of-way as the right-of-way has been widened? A. Less than 6 inches.

Q. Now, Mr. Agnew, would you—I believe you already said your buildings were completed on November 19— A. November 5.

Q. And at that time did you open up a business there? A. I did.

Q. And what kind of a business?

A. We had capacity houses.

Q. I mean what was the nature of the business?

A. Dancing—dancing and a bar.

Q. And at that bar what did you sell or serve?

A. Beer and soft drinks only.

(Testimony of David Wilson Agnew.)

Q. No hard liquor? A. No hard liquor.

Q. And state, Mr. Agnew, now, and describe to the Jury what inconveniences you suffer in the use of your property as a result of having the railroad right-of-way as now proposed come so close to the rear of your property?

A. Well, I have no access to the rear of my lots—to the building—and I could not get back of the building with a truck or wagon or anything of that kind.

Q. Is that of some consequence in connection with the taking of supplies, for the nature of the business?

A. Yes, it is. The supplies have to be stored in the basement, and have to be packed around, and the closeness of the trains naturally would have a vibrating effect—the track being lower than the building—and the noise and the smoke has a bad effect on the business as a whole and we would not be able to use the lower part of the building for apartments, as I had planned. [498].

Q. Now, this is a frame building? I don't believe you told that. A. Frame, yes.

Q. At the time, Mr. Agnew, when you completed your improvements there—in fact, when you started and completed your improvements there in November, 1938, would you just describe what means or ways of access you had to the business district and that your customers had to your place.

(Testimony of David Wilson Agnew.)

A. I built a gravel road from my place to Grand Coulee Boulevard on North Street.

Q. That is on North Street. Referring to the map, Exhibit C—I beg your pardon, I withdraw that. I don't think that map shows. May I have the Government's map? (Counsel refers to map.) At that time, Mr. Agnew, that I am speaking of now, that is when you bought the property and were building there and when you finished your improvements, were there any other streets that you used in addition to North Street?

A. Main Street.

Q. Main Street, as shown on the maps that have been introduced here, including the Government's map—that map only shows it on one side of the right-of-way,— A. Yes.

Q. What was the general nature of the topography of the land between Grand Coulee Boulevard and your place before the railroad company put in this underpass and made the fill and the excavation for the railroad?

A. Of course, I am located on top of the hill and it gradually went downhill to Grand Coulee Boulevard.

Q. When you say gradually—

A. It slopes that way.

Q. It was a general slope, was it?

A. Yes, a general slope. [499]

Q. The area between your property and Grand Coulee Boulevard was more or less flat, in so far as not having any deep excavations—

(Testimony of David Wilson Agnew.)

A. No, there is no deep excavations there.

Q. Or high hills or anything like that. Now, Mr. Agnew, were you still doing business and carrying on the project or enterprise you described, on the fourteenth of December, 1938?

A. I was.

Q. And will you state, Mr. Agnew, what in your opinion was the fair market value of your entire property with these improvements on the fourteenth day of December, 1938?

Mr. Landrum: That is objected to on the ground and for the reason that it does not exclude any increase or increment to that property by virtue of the Central Valley Project, your Honor.

Mr. Kennedy: May I be heard on that, if your Honor please?

The Court: Yes.

(Argument.)

The Court: Objection sustained.

Mr. Landrum: If your Honor please, it is the same question.

Mr. Kennedy: What is the Court's ruling?

The Court: Objection sustained.

Mr. Kennedy: We note an exception, if your Honor please.

The Court: Yes.

Mr. Kennedy: Q. I will ask you, Mr. Agnew, to state what in your opinion was the reasonable market value of that property on what is, and including the area surrounded by the blue marks,

(Testimony of David Wilson Agnew.)

including Lots 1, 2 and 3 as shown on the map, Exhibit C, with the improvements thereon, on the—as of the fourteenth day of December, 1938, leaving out of consideration any increase or increment due to the Central Valley Project since August 26, 1937.

[500]

A. \$15,000.00

Q. I will ask you, Mr. Agnew—the question may come in the wrong order, Mr. Landrum—at the time we speak of, on December 14, 1938, after you had completed these improvements and opened for business, what was your property as you have describe it adaptable for?

A. For a dance hall, bar, or other entertainment, as far as that part is concerned.

Q. What is that?

A. A dance hall or a bar or other kinds of entertainment.

Q. Now, with respect to the strip of land now taken by condemnation off the rear of your lots, Mr. Agnew, will you state what in your opinion was the reasonable market value of that strip of land described in the complaint as I have read it this morning, and being something in excess of 5 feet in width and 153 feet long on December 14, 1938?

Mr. Landrum: That is objected to on the ground and for the reason that it does not exclude from the answer any increase or increment in that value due to the Central Valley Project, your Honor.

The Court: Objection sustained.

(Testimony of David Wilson Agnew.)

Mr. Kennedy: May we have an exception?

The Court: Yes.

Mr. Kennedy: Is it not true, Counsel, that the noting of an exception is no longer required under the new rules?

Mr. Landrum: It is necessary.

The Court: You don't go by the new rules.

Mr. Landrum: No, not in a condemnation proceeding.

Mr. Kennedy: I didn't want to repeat that if it was entirely out of order. [501]

Q. Now, I will ask you, Mr. Agnew, what in your opinion was the reasonable market value of that strip of land back of your property, which has been described here to be something in excess of 5 feet in width, and close to the rear of your building, on December 14, 1938, leaving out of consideration any increase or increment due to the Central Valley Project after August 26, 1937?

A. You mean the actual value of the land or the land and damages?

Q. The strip of land only.

A. Land only, \$150.00.

Q. Now, Mr. Agnew, I will ask you to describe the conditions with respect to your getting to and from your place of business from Grand Coulee Boulevard and your customers and the public traveling to and from your business since the underpass was constructed and the railroad excavation made?

A. After the underpass was built the road was

(Testimony of David Wilson Agnew.)

switched about 10 or 15 feet further over, but it wasn't graveled, and naturally it was very rough. After the road was fenced, they began going around over private property, and the road is very rough. It has ridges in there or ruts, you might say, over 2 feet deep.

Q. That is over private property?

A. That is over private property, yes.

Q. Well, what generally is the condition now pertaining in regard to your business since that underpass was constructed and the railroad excavation made?

A. There is no business.

Q. Has your place been operated lately?

A. No, it has not—in connection with that, I would say it was operated once in December.

Q. December past?

A. Yes. [502]

Q. You mean by "once", one day or one night?

A. One night.

Q. Now, when the underpass was constructed over Grand Coulee Boulevard and this work started on the railroad—By the way, about what time of the year was that, do you recall?

A. If I remember correctly, the excavation there was started either in January or February.

Q. Of 1939, you mean?

A. Yes, 1939.

Q. Now, what happened—just describe what happened to your roads or things concerning the access to your property after that.

A. Well, the access was practically killed.

Q. Why? Describe it.

(Testimony of David Wilson Agnew.)

A. Well, there was a great fill, of course, where the underpass is, and they built the underpass and that cut off—in filling up it cut the road off completely there, you see, and it made a different set-up entirely. Then they went in there with dredges and cutting the holes for the cement foundations, and they had the whole road tied up there for quite a while until that underpass was finished. And then, as I said, the road was changed about 15 or 20 feet; something like that, over the Albert Rouge 40 feet—

Q. Over the Albert Rouge lot shown in evidence here? (Indicating.)

A. Yes. And they used that for a while and then the Government fenced the right-of-way and people began going around the fence then over private property.

Q. With respect to your premises, I will ask you where is the business district and the Central Valley Post Office.

A. The Central Valley Post Office is on the other side of the underpass in a little business district down there, about two [503] blocks.

Q. When you say the other side, you mean—

A. On the other side of the track from my business.

Q. Was there also some business district to the north of the underpass there?

A. There was. I would say about ten places of business on Grand Coulee Boulevard.

(Testimony of David Wilson Agnew.)

Q. With respect to your property and the underpass on Grand Coulee Boulevard, where was the theater?

A. The theater was on Grand Coulee, located a little to the—about, I would say, possibly a block up on Grand Coulee Boulevard, toward Government City.

Mr. Kennedy: I believe, Counsel, Mr. Mellin testified, or it may be understood that Grand Coulee Boulevard is a main thoroughfare, carrying traffic to and from the dam through that region?

Mr. Landrum: I don't know. If you say that is true I am perfectly willing to agree to it.

Mr. Kennedy: Yes, it is. In fact, it has been incorporated with the state highway.

Q. Now, I will ask you, Mr. Agnew, to state what in your opinion was the amount of damage suffered by you to that property as the result of the condemnation of the portions of your land described in this complaint and the construction and maintenance of a railroad over that way in the manner proposed by plaintiff,—

A. That is in Lots 1 and 2?

Q. Just one moment. —by reason of the severance of that land and the operation of that railroad in the manner proposed by plaintiff?

Mr. Landrum: That is objected to on the ground and for the reason that it does not exclude from itself any increase or [504] increment in that value due to the project, your Honor.

(Testimony of David Wilson Agnew.)

The Court: Objection sustained.

Mr. Kennedy: We note an exception, if your Honor please.

The Court: Yes.

Mr. Kennedy: As I understand, Counsel, in other respects you have no objection to the form of the question?

Mr. Landrum: I have no objection other than that, Sir.

Mr. Kennedy: Some counsel insist you ask market value and damages—you don't care which way it is?

Mr. Landrum: No.

Mr. Kennedy: Q. I will ask you, Mr. Agnew, to state what in your opinion was the damage to the remaining portion of your land—I mean with the buildings and improvements—not taken in this proceeding, by reason of the severance of the land and the construction and operation of a railroad over the proposed right-of-way in the manner proposed by plaintiff, as of December 14, 1938, leaving out of consideration any increase or increment in value due to the Central Valley Project after August 26, 1937. A. That is in Lots 1, 2 and 3?

Q. Yes. A. \$10,000.00.

Q. Mr. Agnew, immediately south of and adjacent to the property we have just mentioned in our previous questions is some land—also enclosed in blue on that map in triangular shape—where there is a building now located, a school.

A. Yes, Sir.

(Testimony of David Wilson Agnew.)

Q. At the time of the commencement of this action, Mr. Agnew, were you the owner of that land? That is, December 14, 1938?

A. I held a trust deed on it.

Q. You held a trust deed on it?

A. I bought the lots, deeded the property to a labor union, and [505] took a trust deed back from them.

Q. And as the answer in this case alleges, you were the owner and holder of that trust deed on December 14, 1938? A. I was.

Q. And what was the amount of the indebtedness due to you at that time on the trust deed?

Mr. Landrum: That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, not going to the measure of damages in a condemnation case, your Honor. It is incompetent.

The Court: Objection sustained.

Mr. Kennedy: We will be glad to reframe the question.

Q. Mr. Agnew, state what in your opinion was the market value of your deed of trust on the property described as Lots 2, 3—a portion of Lots 2, 3 and 4 of Block 1 on the fourteenth day of December, 1938.

Mr. Landrum: That is objected to on the ground and for the reason that it does not exclude from the answer any increase or increment in that value due to the project.

The Court: Objection sustained.

(Testimony of David Wilson Agnew.)

Mr. Kennedy: We note an exception. [506]

Q. Mr. Agnew: in stating your answer before recess to the question you were asked with regard to the damage to your land not taken as the result of the condemnation of this right-of-way, and the construction and operation of the road there, will you state what [509] elements you took into account in expressing your decision and opinion as to that damage?

A. Well, the fact that the railroad track would be very close to the building, which would result in damage, and the other inconveniences I spoke of a while ago, and to the fact I am cut off from Grand Coulee Boulevard or other entrances.

Cross Examination

By Mr. Landrum:

Q. Mr. Agnew, you still have that building, have you not? You still have that building, have you not, Sir?

A. Yes, Sir.

Q. You still have your well, have you not, Sir?

A. Yes.

Q. You still have your septic tank, have you not, Sir?

A. Yes.

Q. And you bought this property when?

A. In June, 1938.

Q. And not to take up any time, but the plat which I show you and which has been marked as Defendants' Exhibit A shows your property, does it not? [510]

A. Yes.

(Testimony of David Wilson Agnew.)

Q. And that plat is dated in March, which was before you bought the property, was it not?

A. Yes.

Q. And you heard the testimony in this action and you know that this map shows when it was prepared, do you not? A. Yes.

Q. You made some mention of there being a Lot 4 between your property and the railroad, did you not? A. Yes.

Q. You didn't own Lot 4, did you?

A. I did not.

Q. You completed your buildings on the fifth day of November, 1938, you say? A. Yes, Sir.

Q. And that was long after the plat had been made which covered your property?

Mr. Kennedy: Object to that as not the best evidence, calling for the opinion and the conclusion of the witness.

The Court: There isn't any question about that, is there? [511]

Mr. Kennedy: The date of the recording of the map in the Office of the County Recorder has been shown here, if your Honor please. I object further on the ground it is argumentative.

The Court: Proceed.

Mr. Landrum: Q. Now, Mr. Agnew, you have had to haul water to put it in the well and pump the water out of the well that you put in the well, is that right? A. I did at first.

Q. And of course, in dry seasons there will be no water in that well, is that correct?

(Testimony of David Wilson Agnew.)

A. There will be——

Q. How is that?

A. There will be. It was all this summer.

Q. Now, the bottom of that well, of course, is far below the bottom of the railroad track, isn't it?

A. Yes, Sir.

Q. And the well is in solid rock?

A. Yes, Sir. [512]

FRANCIS E. O'CONNOR,

recalled by the Defendants.

Direct Examination

By Mr. Kennedy:

Q. State your name.

A. Francis E. O'Connor.

Q. What is your occupation?

A. Real estate broker.

Q. Are you a licensed broker of the State of California? A. Yes, Sir.

Q. Are you a graduate of any university of learning? A. Yes, Sir.

Q. What university? A. Georgetown.

Q. What? A. Georgetown.

Q. Where do you reside at the present time?

A. In Redding.

Q. How long have you resided in Redding?

A. About two years and five months.

Q. Prior to that where did you reside?

(Testimony of Francis E. O'Connor.)

A. San Francisco.

Q. How long have you been engaged altogether in the business of real estate broker?

A. About seventeen years.

Q. When did you come to California, if you came from some other [513] state? A. 1922.

Q. 1922? A. Yes, Sir.

Q. Describe what experience you had in carrying on the real estate business in San Francisco and elsewhere. By that I mean did you deal with improved as well as unimproved land in your practice? A. Yes, sir, general practice.

Q. What does general practice include?

A. Subdivision work, sale of unimproved and improved properties.

Q. And in that seventeen years have you had considerable experience in the sale of improved properties? A. Considerable.

Q. As a matter of fact, have you in your work in business in San Francisco assisted in building houses for sale? A. Quite so.

Q. And kindred activities? A. Yes.

Q. Now, do you know the piece of property where the Agnew buildings occupy, on Lots 1, 2 and 3 or Block 2 of Unit 4? A. Yes, Sir.

Q. How long have you known the property? I mean the land. A. Since its existence.

Q. What do you mean by that—

A. You refer to the property?

Q. Yes.

(Testimony of Francis E. O'Connor.)

A. I am familiar with the land since 1937. I am familiar with the——

Q. Beg your pardon?

A. I am familiar with the land since 1937, with the buildings since their construction, original construction.

Q. Now, Mr. O'Connor, where have you been—I will put it this way—chiefly been in business since you came to Redding, Shasta County, about two and a half years ago?

A. In subdividing, developing and sales of Summit City. [514].

Q. Where is Summit City in regard to Government City and Government Camp? I don't believe that has been mentioned here.

A. About two miles west.

Q. You reside in Redding but drive back and forth to Summit City every day? A. Yes, Sir.

Q. Or more than once a day, sometimes?

A. Yes, Sir.

Q. And in connection with carrying on this business at Summit City, have you kept in touch with and observed the development of properties over in Central Valley and other interests that would naturally affect your own business?

A. I have been in the general practice of real estate in and around Redding and Shasta Dam.

Q. Now, you say you recall when Mr. Agnew commenced to build there?

A. I recall his originally starting the work.

(Testimony of Francis E. O'Connor.)

Q. I mean do you recall the date he started in construction there?

A. I don't recall the date but I do recall his starting in construction there.

Q. And from the time Mr. Agnew went there, which has been shown in evidence here as June, 1938, did you from time to time go to or pass by his premises as those buildings were going up?

A. Yes, many times.

Q. State whether or not you are familiar by observation with the improvements Mr. Agnew has placed on his premises.

A. I have been in the building several times.

Q. You have been in the building?

A. Yes, Sir.

Q. Both before and after it was finished?

A. After it was finished.

Q. And you have seen the bunkhouses there?

A. Yes, Sir.

Q. And his other system of carrying on business there? [515] A. Yes, Sir.

Q. And I will ask you whether or not, Mr. O'Connor, on December 14, 1938, you knew and were familiar with the improvements to the property of the defendant, D. W. Agnew, as existing on Lots 1,—2, 3 and 4 of Block 2, Unit 4? A. Yes.

Q. And I will ask you, Mr. O'Connor, what in your opinion was the reasonable market value of Mr. Agnew's land—of these particular lots and his improvements on the fourteenth day of December, 1938?

(Testimony of Francis E. O'Connor.)

Mr. Landrum: That is objected to on the ground and for the reason that it does not exclude from it any increase or increment of that value due to the project, your Honor.

The Court: Objection sustained.

Mr. Kennedy: I would like to note an exception, if the Court please.

The Court: Yes.

Mr. Kennedy: Q. I will ask you, Mr. O'Connor, to state what in your opinion was the fair reasonable market value of the Agnew property, comprising those three lots I have described, and the improvements thereon, as they existed on the fourteenth day of December, 1938, giving your opinion as to the market value—as to such market value on the fourteenth day of December, 1938, leaving out of consideration any increase or increment due to the Central Valley Project since August 26, 1937.

Mr. Landrum: Now, you are talking about the entire land, both what is left and what we are taking?

Mr. Kennedy: Yes.

Mr. Landrum: All right.

A. \$15,000.00.

Mr. Kennedy: Q. Will you state, Mr. O'Connor, what in your opinion is the fair market value of the strip of land in the back [516] of the Agnew premises near the well and septic tank, which is being condemned in this suit on the fourteenth day of December, 1938?

Mr. Landrum: That is objected to on the ground

(Testimony of Francis E. O'Connor.)

and for the reason that it does not exclude from it—from that value any increase or increment due to the project.

The Court: Objection sustained.

Mr. Kennedy: We note an exception, if your Honor please.

The Court: Yes.

Mr. Kennedy: Q. Mr. O'Connor, will you state what in your opinion was the fair market value of the strip of land condemned in this suit that is being taken off the back of the Agnew property as of December 14, 1938, leaving out of consideration any increase or increment of value due to the Central Valley project after August 26, 1937?

A. Not to exceed a hundred dollars.

Q. Mr. O'Connor, perhaps you have already answered this question—but I take it in your activity there you are familiar with the conditions pertaining to this area and the surrounding territory since the work was started on the railroad and the underpass or building of Grand Coulee Boulevard?

A. Yes, I am familiar with it.

Q. You are familiar with that? A. Yes.

Q. And with conditions surrounding there? You have seen the underpass, you have seen the fences and all those things?

A. I have seen them constructed, yes.

Q. Mr. O'Connor, will you state what in your opinion was the amount of damage or is the amount of damage to the remaining portion of the Agnew

(Testimony of Francis E. O'Connor.)

property by reason of the severance of the land in the right-of-way and by reason of the construction and [517] maintenance of the railroad on that right-of-way in the manner proposed by plaintiff in this action—may it please your Honor, I don't know if I have a date in there.

Mr. Landrum: No, you have not.

The Court: You may put it in if you wish.

The Witness: May I have that question read?

Mr. Kennedy: I would like to amend the question first, Mr. O'Connor.

(The reporter read the last question.)

Mr. Kennedy: Q. As of the fourteenth day of December, 1938?

Mr. Landrum: That is objected to, if the Court please, on the ground and for the reason it does not exclude any value given it by virtue of the project.

The Court: Objection sustained.

Mr. Kennedy: We note an exception, if your Honor please.

The Court: You may.

Mr. Kennedy: Mr. O'Connor, will you state what in your opinion was the amount of damage to the Agnew land that is not taken, that is the remaining portion of his property, by reason of the severance of the area taken for the right-of-way and by reason of the construction and operation of a railroad on and along that right-of-way as proposed by the plaintiff, as of December 14, 1938, leaving out of consideration any increase or increment due to the Central Valley Project after August 26, 1937?

(Testimony of Francis E. O'Connor.)

A. About \$13,000.00.

Mr. Kennedy: You may take the witness. [518]

Recross Examination

By Mr. Landrum:

Q. Now, Mr. Witness, Mr. Agnew will still have his building, won't he? A. Yes, sir.

Q. Let me ask you this: Have you been up there at Boomtown ever since it started to grow?

A. Yes—I beg your pardon?

Q. Have you been up there at Boomtown ever since it started to grow?

A. Since October, 1937.

Q. This land at that time was just raw red clay with some pine trees on it, wasn't it?

A. There was a townsite in the development when I entered the [521] premises for the first time.

Q. Was there any building on this property then?

A. This particular property, no.

Q. And has there been any particular increase in Boomtown since December, 1938?

A. Values have remained quite consistent. [522]

BERNARD G. GLAHA

Direct Examination

Q. Mr. Witness, I show you what has been marked by the clerk as Plaintiff's Exhibit 9 for identification. I will ask you to examine that and state what it is.

(Testimony of Bernard G. Glaha.)

A. It is a simple mosaic assembled from photographs secured from the air and covering the area roughly bounded by what might be called the vicinity of McCall Boulevard, in Summit City, and U. S. Highway 99 at a point easterly thereof.

Q. Who took the photograph? A. I did.

Q. Where did you take it from?

A. From an airplane.

Q. When?

A. The survey started on June 30, 1937, and was completed on July 6. [526]

Q. 1937? A. 1937.

Q. State whether or not Plaintiff's Exhibit No. 9 for identification which I am showing you is a correct photograph and correctly depicts the conditions on that ground at the time you speak of.

A. It does. [527]

Cross Examination

The Court: Let me ask you: Have you visited Boomtown, or Central Valley as it is designated, since the improvements now on the property were erected? A. Yes, sir.

Q. At the time you were in the air, did you look down upon what is now Boomtown, the part that now has the improvements on it? A. Yes, sir.

Q. Were there any improvements there at that time?

A. The only improvements in that area were long established farms. [536]

Mr. Landrum: No, at Boomtown, we are talking about. A. At Boomtown? No.

(Testimony of Bernard G. Glaha.)

The Court: Q. I am confining your answer to the Boomtown of Central Valley. A. Yes, sir.

Q. There were no buildings then in Boomtown?

A. No, sir. [537]

GILBERT F. MELLIN.

Direct Examination

Mr. Landrum: Thank you, sir. At this time, if the Court please, we offer in evidence for the purpose of identification Exhibit No. 9.

(The photograph referred to was marked Government's Exhibit No. 9 in evidence.)

Mr. Landrum: Q. Mr. Mellin, will you step over here before this Jury? I want you to point out to this Jury the lands involved in this action.

The Court: Hand Mr. Mellin the pointer. I think if Mr. Mellin will stand where you are, Mr. Landrum—

Mr. Landrum: Q. You tell them just where those lands involved in this action are.

A. The Parcel No. 1 is in the southeast corner of Section 25, marked "Rouge" on the map. The reason that that corner can be definitely known is because of certain markings that were made on the ground to indicate section corners and quarter section corners. Parcel No. 7 extends from the Corum Road, now Grand [539] Coulee Boulevard, northeasterly in this location. Parcel No. 6, being the small part in the western portion of Section 30

(Testimony of Gilbert F. Mellin.)

in the area marked "~~Kelley~~". Johnson, Parcel No. 4, being the diagonal strip through—in the location of the pointer—but not extending to the east line of Kelley. Parcel No. 5, Kronschnabel, being near the eastern line of Kelley and easterly of the Johnson parcel. The route of the railroad would run—

Q. All right. I think that is sufficient. Just tell me this—just tell me this: Is there a building or any buildings shown on Plaintiff's Exhibit 9? If so, point it out to this Jury.

Mr. Kennedy: The same objection, if the Court please, incompetent, irrelevant and immaterial, does not go to the measure of damages or the time of fixing a value in this case.

The Court: Objection overruled.

Mr. Kennedy: We note an exception.

Mr. Landrum: Q. Are there any—strike that, please. There are no buildings shown there at all on the property being taken, is there?

A. No buildings. [540]

Mr. Landrum: Q. Mr. Witness, I show you what the clerk has marked Plaintiff's Exhibit 10 for identification, and I will ask you to examine it and state what it is. [541]

A. This is an enlargement of a photograph taken by myself on December 1, 1937, at the intersection of Grand Coulee Boulevard and U. S. Highway No. 99.

Q. Does Plaintiff's Exhibit No. 10 for identifi-

(Testimony of Gilbert F. Mellin.)

cation correctly depict conditions as they existed as of December—did you say 10, 1937?

A. December 1.

Q. December 1, 1937? A. It does.

Q. And it was taken by you?

A. It was taken by me.

Mr. Landrum: If the Court please, we will offer in evidence at this time Plaintiff's Exhibit 10 for identification.

Mr. Goldstein: I have no objection.

Mr. Kennedy: At this time you are offering it for identification?

Mr. Landrum: I am offering it in evidence.

Mr. Kennedy: I misunderstood the offer. The witness says it was taken December 1?

Mr. Landrum: December 1 or 2, 1937.

A. December 1. [542]

THOMAS G. MAPEL

called by the Government in rebuttal; sworn.

The Clerk: Please state your name to the Court and Jury.

A. Thomas G. Mapel.

Direct Examination

By Mr. Landrum:

Q. Where do you live, Mr. Mapel?

A. Sacramento, California.

Q. How long have you lived in Sacramento?

(Testimony of Thomas G. Mapel.)

A. Since 1919.

Q. What is your business?

A. I am a real estate salesman and appraiser.

Q. Will you sketch briefly for the benefit of the Court and the Jury your experience in connection with the buying, selling, handling and appraisal of real estate.

A. I have been generally engaged in selling and listing real estate for sale in this territory, Central California, for the [565] past ten years, and during that period of time I have done considerable appraisal work for various firms and corporations and lending agencies, among those being the Equitable Life Assurance Society of America, the Veterans Home Loan Bank of Los Angeles, in this particular territory; the Federal Housing Administration; the Home Owners Loan Corporation; the Corporation Commissioner of California; the Insurance Commissioner of California; and many others, appraising property in this Central and Northern California area.

Q. State whether or not you have ever been an officer in any associations of realtors in this locality. Do you have a realtors association here?

A. Yes, I am a member of the Sacramento Real Estate Board, and that membership is affiliated with the National Association of Real Estate Boards, and I am also a member of the American Institute of Real Estate Appraisers.

Q. What opportunity have you had—what has

(Testimony of Thomas G. Mapel.)

been your familiarity with lands in Shasta County, if any?

A. Well, I have appraised property, as I say, in Northern California, the area extending up into Yreka, and I am familiar with the characteristics of the country in that area—my work has taken me primarily into the cities and incorporated areas.

Q. Now, will you state for the benefit of the Court and the Jury, Mr. Witness, what you have done in relation to the particular portions of land involved in this case, what investigation you have made with relation to this particular parcel of land?

Mr. Goldstein: I am going to object to it unless the time and place is fixed. When?

Mr. Landrum: He will say when.

Mr. Goldstein: I would like to have that question precede any [566] answer.

The Witness: May I have the question?

Mr. Landrum: Q. What investigation and when did you make an investigation with relation to the lands involved in this action?

Mr. Goldstein: If your Honor please, I am going to object to the question as being compound. The preliminary question should be when did he make it and then he can ask him what investigation he made. I am going to insist that he divide the question.

Mr. Landrum: All right, Mr. Witness, when did

(Testimony of Thomas G. Mapel.)

you first obtain any *familiar* with the lands involved in this action?

A. I was first called into the case—that is, to ascertain whether or not I would make the valuation report on the several parcels—and subsequent to that, on January 16, I visited—made the first visit to the site.

Mr. Goldstein: What year?

A. 1940. That is in connection with this appraisal assignment. I returned to the several parcels on the twentieth, twenty-first and the twenty-eighth of January of 1940.

Mr. Landrum: Q. Had you known something of the land prior to that time? A. Yes.

Q. Tell us about that.

A. Well, as I say, I have been traveling up and down the Valley considerably, into the farthest northern part of California—Yreka—I am familiar with the terrain of the country, spent considerable time in and around Mt. Shasta and Redding.

Q. Now, just tell us what you did out on that land.

Mr. Goldstein: Just a minute, if the Court please. I am going to object on the ground it is wholly incompetent, irrelevant and immaterial, has no bearing upon the issues, and according to the witness' own testimony this is a long time after the taking, [567] and he isn't qualified under the laws of this state or the United States to testify as an expert witness in this case so far, regardless of the

(Testimony of Thomas G. Mapel.)

fact he said he went up and down through Northern California. I submit that, your Honor, and I am prepared to submit authorities on it—I maintain, if the Court please, that the witness here, going upon the premises in January of 1940, when the taking is alleged to have occurred on December 14, 1938, and where we have been by Government counsel confined to a consideration of values as not considering any date at all except between—that is, prior to August 26, 1937. This witness is precluded from giving his observation or what he saw there in January, 1940, or basing an opinion on it, or doing anything unless he himself was familiar with the land and was upon the land prior to the taking and for a reasonable time before then, or at least before the twenty-sixth of August, 1937, to evaluate what the property may be worth under the theory of Government counsel as a measure of damages.

Mr. Kennedy: We join in the objection, if your Honor please.

Mr. Landrum: If the Court please, may I say to your Honor, the questions are being put to this witness for the purpose of determining his qualification to give to this Jury the reasonable and fair market value of the land. It is expert testimony. This Jury, accordingly, as I understand it, shall give such value to this expert testimony as it sees fit. It goes to the weight of the testimony, not the admissibility. It is true the Jury can give what value it wants to this questioning. I desire to say

(Testimony of Thomas G. Mapel.)

to the Court the question of whether or not a foundation has been laid for an expert witness is discretionary with the Court.

The Court: Can he give the value of it on the date of the taking? [568]

Mr. Landrum: Yes, your Honor, also as of 1937. It is a question of discretion with the Court. This man is an expert.

The Court: I appreciate that.

(Argument.)

The Court: Are you restricting the question to the date of taking?

Mr. Landrum: It is our position, your Honor, that this man is an expert, and it is our position that the question of whether or not he is qualified to give an opinion as an expert is for this Court to determine, and the weight this Jury shall give to this testimony is determined by what the Jury thinks his experience has qualified him to give that opinion.

The Court: That isn't the question I asked, Mr. Landrum. I am asking if you are restricting your question to the time of the taking by the Government.

Mr. Landrum: No, sir.

The Court: That is the restriction you placed on the defendants.

Mr. Landrum: All right, I am going to ask the same question of this witness, your Honor, that I

(Testimony of Thomas G. Mapel.)

insisted he asked on behalf of the Government.

The Court: Objection overruled.

Mr. Landrum: Mr. Reporter—Will you ask the reporter to read the question?

The Court: The reporter will read the question.

(The reporter read the question as follows: "Now, just tell us what you did out on that land.")

A, I first procured maps of the several parcels involved in this action. I then visited the sites, the several sites. I talked to the owners, several of the owners—I will recall that, not [569] several—I talked to owners of land in the vicinity of the several sites; I talked to tenants renting cabins and living in the vicinity. I also talked to brokers operating in the Redding area—

Mr. Goldstein: We object to all this, your Honor, on the ground it is not responsive to the question, and has no bearing on these issues.

Mr. Kennedy: I desire to join in that objection, and on the additional ground it is hearsay.

Mr. Landrum: No, your Honor, it is absolutely proper testimony in that it shows what this witness did to qualify himself to give this opinion. He is not going to give what they said to him, he is saying what he did to qualify himself.

(Argument.)

The Court: Proceed; objection overruled.

Mr. Landrum: Go ahead, tell us what you did, Mr. Witness.

A., Well, after having talked to the owners, ten-

(Testimony of Thomas G. Mapel.)

ants, and brokers operating in the district I inspected the parcels of lands, investigated the listings—there were a few of them—sales that had occurred in the district concerning the several parcels of land, and in fact I attempted to do about everything an informed buyer would do if he was considering purchasing any of this property in that particular area. [570]

Mr. Landrum: Q. Mr. Mapel, state whether or not you have been present here in the court room practically throughout the trial of this action and have heard the testimony given as to facts upon that witness stand.

A. I have been here on each day with the exception of the Monday that I believe the case opened.

Q. State whether or not you have made an examination of the aerial photograph which has been marked in this action as Plaintiff's Exhibit No. 9.

A. I have inspected it.

Q. State whether or not you have heard the testimony of Mr. Mellin as to the facts in this case.

A. I have heard the testimony.

Q. Now, Mr. Mapel, from your experience in the buying and selling of real estate, your own personal investigation of the land involved in this action known as the Van Santen portion of Parcel No. 1, and the testimony you have heard in this case with relation to facts, do you have an opinion of the reasonable and fair market value of that

(Testimony of Thomas G. Mapel.)

portion of the Van Santen property [573] which is being taken in this action as of December 14, 1938, leaving out of and excluding from consideration any increase or increment to that property due to the so called Central Valley Project of the United States Government from the twenty-sixth day of August, 1937.

Mr. Goldstein: Just a minute, before you answer the question. If your Honor please, I take it Counsel has now diverted to Parcel No. 1 in the pleadings and is referring to the Van Santen land?

Mr. Landrum: That is right.

Mr. Goldstein: Included in the Rouge tract. I now desire to offer a formal objection to the witness answering and the testimony of the witness upon the ground it is incompetent, irrelevant and immaterial, not properly qualified to answer that question, and the proper foundation has not been laid.

The Court: Objection overruled.

Mr. Goldstein: Note an exception.

Mr. Landrum: Q. The question is do you have an opinion? It may be answered yes or no.

A. I have an opinion.

Q. What is your opinion of that fair market value of that portion of the so-called Van Santen tract which is being taken in this action?

Mr. Goldstein: Same objection.

The Court: Same ruling.

Mr. Goldstein: Same exception.

A. 12½ cents.

(Testimony of Thomas G. Mapel.)

Mr. Goldstein: What was the answer?

Mr. Landrum: 121½ cents.

Q. What do you understand to be the acreage of that property, sir, [574] the part taken?

A. It is .0125 acres.

Q. It is a little better than 1/100th of an acre, is that what you mean? A. Yes.

Q. Do you have the dimensions of it?

A. As near as I could measure it, 6 feet wide by 102 feet in length, containing 544 square feet of area.

Q. Mr. Mapel—

Mr. Goldstein: I didn't get that answer.

Mr. Landrum: Containing 544 square feet.

A. 544 square feet.

Q. Mr. Mapel, from your experience in connection with buying and selling of real estate, your own personal investigation of this land, and the testimony you have heard in this court room with relation to the facts, do you have an opinion of the reasonable and fair market value of that portion of the Van Santen tract which is not being taken in this action as of December 14, 1938, leaving out of consideration any increase or increment thereto since August 26, 1937, by virtue of the Central Valley Project, before the taking?

Mr. Goldstein: Just a minute. If your Honor please, in order to save time, will Counsel stipulate—and I think perhaps the best method would be to make the formal objection to this entire line of

(Testimony of Thomas G. Mapel.)

testimony upon the part of the Witness Mr. Mapel, upon the ground it is incompetent, irrelevant and immaterial, and the proper foundation not laid, he is not qualified as an expert to testify, and that my objection is deemed to each and every question asked of this witness concerning the parcel of land for those property owners which I represent, and also on behalf of my [575] associates in order to save time, that the objection goes on the same grounds to each and every question asked the witness as to any of the parcels described in this complaint, the subject of this controversy and referred to by Government counsel, the various parcels now before the Court, on the ground it is incompetent, irrelevant and immaterial, the witness is not qualified to answer, the proper foundation has not been laid, and that the Court overrules the objection, and we will save an exception to each and every ruling?

Mr. Landrum: I am perfectly willing to stipulate to that.

The Court: Yes. If both your associates join in that. That is correct?

Mr. Kennedy: I join in it, and I would like, if Mr. Goldstein accepts the suggestion, to add into the objection that by the inclusion of the phrase, "leaving out of consideration in that value any increase or increment due to the Central Valley Project", and so forth, since August 26, 1937—I will also object on the ground it is not the proper basis or the proper measure of damages.

(Testimony of Thomas G. Mapel.)

Mr. Goldstein: That is right, as to any questions as to market value, either the taking or severance damage as of December 14, 1938, in the cases of the parcels referred to by the Government in the Johnson case and as of December 9, 1938, as to the parcels in the Kinsella tract. In other words, the objection will be two fold to this entire line of testimony and to all of the questions submitted.

Mr. Landrum: As I understand that, your Honor, their objection is to the foundation and the qualification of the witness first, and second on the fixing of the date of August 26, 1937, in giving the opinion as to value of the property and [576] excluding any increase to the value due to the Central Valley Project. Those were the two propositions?

Mr. Goldstein: Yes.

Mr. Landrum: Perfectly willing to stipulate.

The Court: So ordered.

Mr. Goldstein: We are reserving, of course, an exception.

Mr. Kennedy: We reserve an exception.

Mr. Landrum: In order to save time of the reporter reading the question may I ask the same question: Q. From your experience in connection with the buying and selling of real estate, your own personal investigation of the property involved in this case and the testimony you have heard in this court room with relation to the facts, do you have an opinion of the reasonable and fair market value of that portion of the Van Santen property

(Testimony of Thomas G. Mapel.)

remaining after the taking in this case, as of December 14, 1938, leaving out of your answer and excluding from that answer any increase or increment to that value due to the so called Central Valley Project of the United States Government from August 26, 1937? Do you have an opinion?

A. I have.

Q. And what is your opinion of that value? That is, before the taking?

A. You will pardon me; this is of the remainder? The value of the remainder?

Q. Yes, sir.

A. I am without figures, so if you will just allow a minute I will get the exact amount. It figures about a dollar.

Q. Asking you the same question with relation to the parcel remaining in the Van Santen property after the taking—in other words, what I am getting at now is the severance damage—what [577] was it worth after the taking—maybe if I put it this way it would be clearer: In your opinion, was there any severance damage? A. Yes.

Q. Give us the amount, your opinion of that amount, Sir.

A. I have ascertained 12½ cents.

Q. Then, is it your opinion that the just compensation to the Van Santens by virtue of the taking by the Government is 25 cents?

Mr. Goldstein: Just a minute. He is calling for a conclusion of the witness. That is a fact for the

(Testimony of Thomas G. Mapel.)

Jury to find; what is just compensation. He can testify what in his opinion the damage is, but he can't say whether it is just compensation or not. That is a question of fact for the Jury to determine in this case.

Mr. Landrum: Of course it is. I will withdraw the question.

Q. What is your opinion, then, of the entire damage to the Van Santens by virtue of this taking?

A. 25 cents.

Q. Yes, sir, 25 cents. Mr. Witness, from your experience in connection with the buying and selling of real estate, your own personal investigation of property involved in this case, and the testimony you have heard in the court room in this case as to the facts, do you have an opinion of the fair and reasonable market value of that portion of the Rouge tract—Rouge ownership in Parcel No. 1?

A. I have.

Q. What is your opinion of that value?

A. The value of the whole piece is \$6.00.

Q. In your opinion is there any damage to the remainder by virtue of this taking as to the Rouge ownership in Parcel No. 1? A. There is. [578]

Q. What in your opinion is that damage to the remainder? A. \$5.50.

Q. Then, is it your testimony that the total damage to the so called Rouge ownership of Parcel No. 1 is—what is it, eleven dollars and— A. \$6.00.

Q. \$6.00. What I am trying to get at is what is

(Testimony of Thomas G. Mapel.)

your total damage to the Rouge ownership in Parcel No. 1, including the value of the portion taken and plus what damage to the piece remaining— Let me get at it this way: What do you place as the value of the part taken? A. 50 cents.

Q. Then, as to the Rouge No. 1, Parcel No. 1, it is your opinion the value of the part taken is 50 cents? A. Correct.

Q: And the damage to the remainder is \$5.50?

A. Correct.

Q. Now, Mr. Mapel, in connection with your experience in buying and selling real estate, your own personal investigation of the property described in this action as the Kronschnabel portion of Parcel No. 1, and from the facts which you have heard testified to in this court room, do you have an opinion of the reasonable and fair market value of that property taken as of December 14, 1938, excluding from your answer any increase or increment there-to by virtue of the so called Central Valley Project of the United States Government from and after August 26, 1937? A. I have.

Q. And what is your opinion of the market value of that portion of the Kronschnabel ownership of Parcel No. 1? A. \$31.10. [579]

Q. What do you understand to be the acreage of that? A. 3.11 acres.

Q. And that is \$10.00 an acre?

A. At the rate of \$10.00 an acre.

Q. In your opinion is there any damage to the

(Testimony of Thomas G. Mapel.)

remainder in connection with the taking of that 3.11 acres of the Kronsnabel ownership of Parcel No. 1?

A. The 3.11 acres takes the entire piece.

Q. So as to that particular ownership of Parcel No. 1 you don't give any severance or damage to the remainder? A. There is no severance.

Q. Yes, Mr. Mapel. Now, if we will go over to Parcel No. 4, which has been referred to in this action as the Johnson land, what do you understand to have been the entire acreage of that property before the taking?

A. The entire acreage before the taking was 17.81 acres.

Q. What do you understand to be the acreage taken in this proceeding? A. 4.81 acres.

Q. Mr. Mapel, from your experience in the buying and selling of real estate, your personal investigation of Parcel No. 4 known in this action as the Johnson property, and the testimony as to the facts which you have heard in this court room in this case, do you have an opinion of the fair market value of that portion of Parcel No. 4 known as the Johnson land taken by the United States Government in this action as of December 14, 1938, excluding therefrom any increase or increment coming to that land by virtue of the so called Central Valley Project of the United States Government from and after August 26, 1937? A. I have.

Q. What is that figure? A. \$48.50. [580]

(Testimony of Thomas G. Mapel.)

Q. \$48.50 is the value you place on the part taken in the Johnson property? A. Yes, sir.

Q. How much is that an acre?

A. That is estimated at the rate of \$10.00⁰⁰ per acre.

Q. \$10.00 per acre. That is the same thing you said with relation to Kronschnabel? A. Yes.

Q. Mr. Mapel, from your experience in connection with the buying and selling of real estate, your own personal investigation of the property involved in this proceeding, and the testimony you have heard in this court room with relation to the facts, do you have an opinion of the fair market value of that portion of Parcel No. 4 of the Johnson property before the taking on December 14, 1938, leaving out of consideration any increase or increment thereto due to the Central Valley Project of the United States Government from and after August 26, 1937? A. I have.

Q. What is your opinion of that value of the remainder before the taking—by the way, this may be a different method of arriving at the damage than what I have done before. A. Yes.

Mr. Landrum: Then I will withdraw the question in order that the witness may *I* understand that more readily.

Q. Mr. Mapel, from your experience in the buying and selling of real estate, your own personal investigation of this property involved in this proceeding, and the testimony you have heard in this

(Testimony of Thomas G. Mapel.)

court room with relation to the facts, do you have an opinion as to the damage to the remainder of the so called Johnson parcel No. 4 in this action, as of December 14, 1937, excluding therefrom [581] any increase or increment—

A Voice: 1938.

Mr. Landrum: Q. (Continuing:). —as of December 14, 1938, excluding therefrom any increase or increment due to the Central Valley Project of the United States Government from and after August 26, 1937? A. I have.

Q. What is your opinion as to the damage to the remainder of Tract No. 4 of the Johnson property? A. \$50.00.

Q. Will you be good enough to tell this Jury how you arrive at that figure?

A. In estimating the severance damage in this particular case where the division of the property has occurred, leaving an acreage of 6.1 acres separate from the larger portion, which was 6.9 acres, I concluded that the loss there was equal to the value of the part taken, by reason of the fact that it was separated from the main parcel. I therefore concluded that \$50.00 would be a fair severance damage which could be added to the value of the part taken, making a total of \$98.50.

Q. Then, your total damage to Parcel No. 4, the Johnson property, was \$98.50?

A. That is correct.

Q. Will you just tell us what the character of

(Testimony of Thomas G. Mapel.)

that 6 acres over across the railroad track in the Johnson property is?

A. Well, the portion remaining—that is, that has been severed—if you will pardon me,—has a high point on the back end of the particular acreage; it rises rather abruptly from the railroad right-of-way. It has brush and some trees on it. It seems as though it is undisturbed. It is more or less in its [582] original state.

Q. By the way, did I ask you as to the part taken, how much you figured that per acre?

A. Yes.

Q. How much did you figure?

A. \$10.00 an acre. [583]

Q. I will ask you, Mr. Mapel, whether or not you are familiar with the Parcel No. 6, known as the Agnew property? Are you? A. I am.

Q. Now, do you know where the back door of that property is with relation to the building? Where is it located on the building, if you know?

A. It is located—I will describe it as being about 4 feet to the left of the right line of the building facing the building—now, I have lost my direction as to north or south—

Q. What I am getting at, Mr. Mapel, is it over towards the corner of the back or towards the center of the back? A. It is towards the corner.

Q. How far would you say it was from the corner? [585] A. I would assume 4 feet.

Q. State whether or not there is a platform out there at that back door. A. There is.

(Testimony of Thomas G. Mapel.)

Mr. Landrum: Possibly, your Honor, if I could have one of these maps maybe we could make that just a little clearer. I don't know just which one it is. I want to get the Agnew property.

Q. Now, Mr. Mapel, (showing map to witness)—get it over a little closer; we might be interested in this. Mr. Mapel, do you feel that you can locate the Agnew property on this exhibit which has been marked as U. S. Exhibit No. 2?

A. Yes, I can by pointing it out.

Q. Would you be good enough to step down and do it, sir? A. It is here (indicating).

Q. Now, what we are particularly interested in, we want to know to the best of your ability where you found the back door of the Agnew building. I want you to take this pencil and mark it as well as you can on that map.

A. The building on this side line is approximately—or is 84 feet in length. It is 18 feet from the side line to the building itself. The building extends back to 14 feet by tape line measurement to the rear line. It then extends this way—I might draw a small plot as I remember the building—and the door would be 4 feet off of that line right there (indicating and marking).

Q. Now, as I understand you, Mr. Mapel, there is nothing on this portion of that lot which lies, I believe, south of the Agnew building on its own lot, is that right? A. That is correct.

Q. And it abuts upon a street there, does it?

(Testimony of Thomas G. Mapel.)

A. Yes, there is a street there. [586]

Q. And the back door is just 4 feet from the corner, back corner of that building? That is right?

A. Approximately. I didn't measure that location.

Q. And the platform out there at that back door, about how large is that?

A. I haven't that measurement.

Q. Mr. Mapel, I want to call your attention to this fact on this exhibit, that there is red line on here which, according to the testimony as I recall it, was drawn by Mr. Mellin, showing the line that this Jury took in viewing this property, and if this Jury had been standing right at the point here where I am showing with this pencil on this Exhibit No. 2, they would have been standing right close to the back door of that property, would they not? A. They would have.

The Court: Ladies and Gentlemen of the Jury, we will now adjourn until tomorrow morning at 10:00 o'clock, and before departing I ask you to remember the admonition given you by the Court and abide by it. You are now excused until 10:00 o'clock tomorrow morning.

Mr. Kennedy: May I be heard, your Honor, before the adjournment? Naturally, I anticipated this afternoon the cases would be heard in the same order we have been hearing them heretofore, and I might say unexpectedly Counsel called a witness to the stand on the Kinsella property, and I would

(Testimony of Thomas G. Mapel.)

like to say now I would like to ask him a few questions on cross examination at such time as your Honor will give us—

The Court: Yes, sir. In the morning.

Mr. Landrum: Yes, we will have him here.

(Thereupon a recess was taken until 10:00 o'clock in the morning, Thursday, February 8, 1940.) [587]

Thursday, February 8, 1940

10:00 A. M.

(It was stipulated by counsel that all the jurors were present and in the jury box.)

THOMAS G. MAPEL

on the stand.

Direct Examination,
resumed.

By Mr. Landrum:

Q. Mr. Mapel, from your experience in the buying, selling and handling of real estate, and your own personal investigation of the land involved in this action known as the Agnew property, being Parcel No. 6, and the testimony which you heard in this court room with relation to facts, do you have an opinion of the fair market value of that portion of the Agnew property which is being taken in this action as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the so called Central Valley Project of the

(Testimony of Thomas G. Mapel.)

United States, from and after August 26, 1937?

Mr. Kennedy: If your Honor please, to that I desire to interpose an objection. We have a stipulated objection arranged yesterday with respect to this general line of testimony, but I want to point out to the Court and state in the objection that we are now dealing with a piece of property that the testimony shows was acquired by Mr. Agnew long after August 26, 1937; that in addition to the objections heretofore stated, we point out this is not the proper measure of value or proper measure of damages as to the Agnew property, which should be fixed as of the date of taking, namely, December 14, 1938, without regard to this supposed increase due to the Central Valley Project after August 26, 1937. I desire to have the record show in regard to this particular piece of property we have a different situation than in the others. [588]

The Court: Objection overruled.

Mr. Kennedy: We note an exception.

A. I have.

Mr. Landrum: Q: What is your opinion of that fair market value?

Mr. Kennedy: May we have the same objection?

The Court: Yes; overruled.

Mr. Kennedy: We note an exception.

A. The value of the part taken?

Q. Yes, Mr. Mapel.

A. Subject to the limiting conditions you have just outlined?

Q. Yes, Mr. Witness.

A. 20 cents.

(Testimony of Thomas G. Mapel.)

Q. How much per acre is that?

Mr. Kennedy: We have the same objection to all this line of questions?

The Court: Yes.

A. The computation of 2/100ths of an acre is based upon a value of \$10.00 an acre.

Mr. Landrum: I will ask you, Mr. Witness, if in answering all of these questions I have heretofore asked you with relation to these values did you base them all on \$10.00 an acre?

A. So far I have.

Q. In other words, you have taken \$10.00 an acre as your basis and then figured what portion of an acre was taken, that is the way you have answered the questions, is that right?

A. Yes, I have.

Q. Now, Mr. Maple, from your experience in the buying, selling and handling of real estate, and your own personal investigation of the property involved in this action known as the Agnew property, and from the testimony you have heard given in this [589] court room with relation to the facts, do you have an opinion with regard to the damage, if any, which has been done to the property remaining to Mr. Agnew, after the taking, as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the so called Central Valley Project of the United States from and after August 26, 1937?

Mr. Kennedy: May it please the Court, we desire at this time to interpose the objection previously

(Testimony of Thomas G. Mapel.)

stated by me this morning, in addition to the general objection which was reserved by stipulation yesterday, that this is incompetent, irrelevant and immaterial, not going to the proper date of fixing valuation, and that it is not the proper measure of damages in the Agnew case.

The Court: Objection overruled.

Mr. Kennedy: We note an exception.

A. I have. The damage as to the remainder is 20 cents.

Mr. Landrum: Q. Will you state how you arrive at that?

Mr. Kennedy: Interpose the same objection.

The Court: Yes, it will be understood.

Mr. Landrum: Will you state how you arrive at that?

A. In arriving I drew my conclusions—that is, by taking into consideration the computation of it from a small acreage, subject to the limited conditions that have been called for in this value report, and concluded the value of the part taken a like amount would represent a fair value as to the damage.

Q. Yes. The Agnew property of which we are now speaking is the property which you pointed out yesterday on the exhibit which is now on the black-board? That is correct, is it? A. It is.

Q. Mr. Mapel, from your experience in the buying and selling and handling of real estate, and your own personal investigation of [590] so called McConnell tract, being Parcel No. 7 in this action,

(Testimony of Thomas G. Mapel.)

and the testimony you have heard in this court room as to the facts, do you have an opinion of the fair market value of that tract of land as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the so called Central Valley Project of the United States, from and after August 26, 1937? A. I have.

Q. I will ask you to state what your opinion of that value is. The part taken, Mr. Mapel.

A. \$110.50.

Q. How many acres is that? The part taken, Mr. Witness. A. The part taken is 10.61 acres.

Q. Yes. Now, from your experience in connection with the buying and selling and handling of real estate, and your own personal inspection of the property involved in this action known as the McConnell property, being Tract No. 7, and the testimony which you have heard in this court room with relation to facts, do you have an opinion with regard to the damage, if any, which has been done to this tract of land by virtue of the taking therefrom of the acreage which is taken, as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the so-called Central Valley Project of the United States, from and after August 26, 1937?

A. The acreage taken is so close to the entire acreage that I have computed the value of the part taken as being the whole parcel.

Q. Yes.

(Testimony of Thomas G. Mapel.)

A. And the value of the part taken as I have just testified in my opinion is \$110.50.

Q. In order that we may clearly understand, Mr. Mapel, your [591] opinion of the total damage to the McConnell tract is \$110.50?

A. That is correct.

Q. The acreage taken is 10.61 acres, is that correct? A. That is correct.

Q. And the remainder in the McConnell tract are two little pieces of 22/100ths of an acre on each side, is that correct?

A. Yes, two small portions.

Q. And you in your answer with relation to the value of the part taken have given to them the entire value, in your judgment, of that which is remaining to that also, is that correct?

A. That is correct.

Q. If you add that to the 10.61 acres taken do you get 11.05 acres? A. That is correct.

Q. Then that would be figured at \$10.00 an acre? A. That is correct.

Q. Now, up to this point you have given your opinion as to all of these tracts at \$10.00 an acre, is that right? A. That is correct. [592]

Cross Examination

Q. Let me ask you this question, Mr. Mapel: Mr. Landrum put the question to you with reference to the valuations which you put—which I will reach in a short time—that he put this question to you: "What was the market value of the piece of land

(Testimony of Thomas G. Mapel.)

described in Parcel 1 known as the Van Santen property on the fourteenth day of December, 1938, leaving out therefrom any increase or increment by reason of the United States Government Central Valley Water Project after August 26, 1937, as of December 14, 1938?" Do you remember that question? A. Yes.

Q. And then you said, "I do know the value, I do," and then you gave it. What did you mean when you said you left out the Central Valley Water Project from August 26, 1937, up to December 14, 1938?

A. Because the limiting conditions surrounding the request for this valuation took into consideration dismissing any economic value—any increment in value that would be brought about by reason of the project coming into existence. It automatically stepped one back in estimating market value to a time prior to [610] and a condition prior to the existence of the Central Valley Project.

Q. Prior to when? Prior to what date?

A. Prior to the date that was given.

Q. What date?

A. December 14 in some instances and December 9 in the other, 1938.

Q. But you said you weren't to take into consideration prior to the date—Didn't you mean August 26, 1937?

A. As I understand from the testimony and facts brought out in the court, that was the date of the announcement or rather the—

(Testimony of Thomas G. Mapel.)

Q. That is what they told me, is that right?

A. Yes.

Q. Yes. And they told you to figure values dismissing everything from your consideration except the date August 26, 1937—

Mr. Landrum: That is objected to on the ground and for the reason that this Court has stated that is the law. It is not a question of whether they told him to take August 26, 1937. This Court told them, your Honor.

Mr. Goldstein: If your Honor please, this is a different question altogether. I am not disputing that feature of it at all. I am asking the witness preliminarily, first of all, if that is what was the instruction, and then I am going to ask him what he knew about the project.

The Court: Objection overruled.

Mr. Goldstein: Q. That is a fact? That is what they told you, to take this value as of August 26, 1937?

A. The request for the appraisal was based on that limitation for the market value to be estimated as of—or, rather, without taking into consideration any increment in value by reason of the Central Valley Project. [611]

Q. Did they tell you what the Central Valley Project was up to August 26, 1937?

A. No. I had to investigate that.

Q. How is that?

A. I had to investigate that.

(Testimony of Thomas G. Mapel.)

Q. You stated to this Jury you were an expert in real estate values, that is correct?

A. Mr. Landrum asked me the question.

Q. All right. Can you tell this Jury whether or not at the time you fixed your values given to this Jury yesterday afternoon and this morning you took into consideration the Central Valley Project from December 19, 1933, up to and including August 26, 1937? Do you understand the question? May I have the reporter read the question to him?

The Witness: I think I have your thought, but I would like to have it read.

The Court: Yes.

(The reporter read the question.)

A. It was necessary to take into consideration that the project would have—would reflect a value in the district by reason of it, you would have to take that into consideration, but the appraisal was made dismissing it.

Q. Completely? A. Completely.

Q. The Central Valley Project? A. Yes.

Q. All right. So we will understand this clearly, the appraisal and the figures that you testified to before this Jury eliminated completely any consideration or question, whether economic or financial, anything pertaining to the Central Valley Project? A. That is correct.

Q. All right, now. If, as a matter of fact, on Tuesday, December 19, 1933—strike that. If, as a matter of fact, in April of [612] 1933 the Legis-

(Testimony of Thomas G. Mapel.)

lature of the State of California passed a Constitutional Amendment in connection with the creation of the Central Valley Project, would that make any difference in your figures as to the valuation that you gave to this Jury? A. No difference.

Q. If, as a matter of fact on Tuesday, December 19, 1933, this Act creating the Central Valley Project was voted upon by the people by a referendum and voted by the people under the laws of California, and in that election of December 19, 1933, the Central Valley Project passed and became a project of the State of California, would that make any difference in your valuation figures?

A. In the figure I have given it would make no difference.

Q. If as a matter of fact this Act of the State of California that I have referred to, which became—which became a project of the State of California after the vote of the people on December 19, 1933, provided that certain purposes shall be served by the creation of this project in the vicinity of this property and within four miles therefrom—as I say, in 1933—would that make any difference in your valuation as given to this Jury?

A. The figure that I expressed as an estimate of the fair market value of the several parcels of land involved in this suit expressed a value—a market value, taking into consideration no increment in value by reason of the project.

Q. I will ask you whether or not do you know

(Testimony of Thomas G. Mapel.)

anything at all about the details of that project as a real estate man and expert?

A. Yes, I think I do.

Q. What do you know about it?

A. Well, I know that the existence of such a project would create an economic situation surrounding the various cities in or about [613] a project of that type, would reflect in an economic situation. Those were the conditions which I took into consideration, dismissing them finally from my final value.

Q. Is that what you say you dismissed from consideration, that you told the Jury?

A. Yes, in connection with the real estate values, that would be the economic picture brought about in these cities and towns nearby, would have some material picture on the market value of the area.

Q. That is your idea of the Central Valley Project?

A. No, that is my idea of the real estate values.

[614]

Mr. Goldstein: Q. I will put that question again to you, Mr. Mapel: Did you take into consideration that under the Central Valley Project Act of 1933 it was proposed to impound the flood waters of the Sacramento River at Kennett and to have those waters used for irrigation purposes, not only in Northern California but in the San Joaquin Valley?

A. I didn't take—when you refer to 1933—the pamphlet you have in your hand—I took my con-

(Testimony of Thomas G. Mapel.)

cept of the project as a whole up to the present time.

Q. I am trying to find out—

A. I would like to elaborate on my answer if I may. Perhaps it might help us out.

Q. Go ahead.

A. I did take into consideration the economic picture as it would reflect itself into a market value of the subject property that we are considering at the present time, and by economic value—the economic picture as I have stated, I mean any increment in value that would be brought up by reason of that, I dismissed it—after considering it I dismissed it to arrive at the market value. It simply turns you back to an acreage set-up. All I can visualize is wooded lanes, rolling hills—

Q. Didn't you tell the Jury before the recess you didn't consider the Central Valley Project for any purpose, even from the date of the passage of the Act in December, 1933, in making your appraisal of the value?

A. Your questions in that regard were a little confusing; those [618] were very lengthy, and I couldn't say—

Q. All right; let me ask you this question: Did you take into consideration—strike that, please. Do you know anything about the river flow in the summertime of the Sacramento River in Northern California?

A. As a layman, yes.

Q. What do you know about it?

(Testimony of Thomas G. Mapel.)

A. I know the river is exceptionally low at times, most of the summer, and I understand there is a salinity condition that occurs in the delta section south of Sacramento down toward the Bay area—perhaps to the waters of the Suisun Bay and perhaps five miles of where the Sacramento River runs into Suisun Bay.

Q. Do you know how many acres is involved in that delta that is affected by this salinity condition?

A. I don't know, but I understand it is approximately 100 square miles.

Q. Don't you know there is more than 400,000 acres affected?

A. No, but taking it in terms of miles it is estimated at 100 square miles, the Sacramento Delta.

Q. Did you take into consideration in connection with this the dam—the Friant Dam—from 1933, from December, 1933, up to August 26, 1937—the Friant Dam situated in the mountains of Fresno County?

A. No, I did not—as reflected in the market value.

Q. That is what I have reference to, yes. Did you take into consideration in fixing your valuation the fact that it was proposed to run a power line from the Kennett Dam or the Shasta Dam to Antioch to supply power and make it possible to have municipal ownership of light—rather of power, for both domestic and commercial purposes in the entire district to be [619] served?

(Testimony of Thomas G. Mapel.)

A. Yes, that is part of the project. [620]

Q. You saw all of that. And then it is your testimony to this Jury, considering what you saw there—and I am not asking you what you ascertained or for any value—considering what you saw there, that you then fixed the valuation of these respective properties as of December 14, 1938, upon the hypothesis and basis of being range land?

A. Yes, and may I further explain—

Q. Yes. Go right ahead.

A. Having seen the development that took place and has taken place by reason of the dam, I considered the land in question, without any reference to the project—that is, to the development in this particular area—by “project” I mean Boomtown or the improvements that have occurred there—I reasoned it out in this manner, that had there been no project the land would have remained as rolling hills, brush land—

Q. You mean no United States Government project, don't you?

A. By reason of having no project in there.

Q. Didn't you mean no United States Government project?

A. No Central California project.

Q. So you didn't follow the advice given to you by the gentlemen of the Bureau of Reclamation to consider nothing from August 26, 1937, to December 14, 1938?

A. I took no advice from the gentlemen of the Bureau of Reclamation.

(Testimony of Thomas G. Mapel.)

Q. You went further, didn't you, you eliminated everything from that property in connection with the Central Valley project from December, 1933, clear on up to August 26, 1937, didn't you? [625]

A. The request for the appraisal—pardon me, could I have that question again?

Mr. Goldstein: May the reporter read it, your Honor?

The Court: Yes.

(The reporter read the question.)

A. Yes.

Mr. Goldstein: Q. You did?

A. Yes. [626]

Q. That is correct, Sir. Then, you don't know, Mr. Mapel, what the situation was regarding any of that property for subdivision purposes in 1937 and 1938, do you?

A. My study of the property—the tract of land—and based upon experience I have had in other areas gave me an indication of what stood there prior to the time Boomtown came in.

Q. Wasn't that land adaptable for subdivision purposes?

A. Eliminating anything referring to the Central Valley Project it would be, in my opinion, a very uneconomic proposition.

Q. I am not asking you about economics. I am asking you if it is adaptable to subdivision purposes.

Mr. Landrum: I submit, your Honor, he has answered the question. The cases, we have a number

(Testimony of Thomas G. Mapel.)

of them, have held that the economic factor is one of the material elements of property adaptable to subdivision. [635]

Q. Now, was that land—or did you take into consideration that that land being in close proximity to the Kennett Dam was suitable subdivision purposes or adaptable for subdivision purposes?

A. Yes, I considered whether or not it would be adaptable for subdivision purposes.

Q. Was it adaptable for subdivision purposes?

A. It was not, excluding the project.

Q. I wasn't asking you that.

A. Well, I felt there was no economic need for it.

Q. I am speaking now from the topography of the land and the condition of the land, except for economic need, wouldn't it be suitable for subdivision purposes if a city was started there?

A. If a city was started there, yes.

Q. When you made your investigation, did you ascertain any of the sales that were made in that vicinity or in that section I called your attention to on Government's Exhibit No. 9 in connection with other purposes located there? [637]

Mr. Landrum: That is objected to on the ground and for the reason it is indefinite as to time. If your Honor please, it is my recollection that your Honor has already ruled in this case that conditions subsequent to August 26, 1937, could not be shown.

(Testimony of Thomas G. Mapel.)

Mr. Goldstein: May I be heard, your Honor, on that? I would like to make an offer of proof. I desire now——

Mr. Landrum: Just a moment,——

Mr. Goldstein: Without mentioning any specific sales——

Mr. Landrum: I don't want to interfere, your Honor—I trust I may be forgiven if you think I am too insistent about this, but I feel possibly if there were an offer of proof to be made it might be better if it was made not in front of the Jury now. Your Honor has already ruled that anything subsequent to August 26, 1937, could not be shown, and it seems to me that that very fact should determine the question of whether or not something your Honor has ruled is not admissible——

Mr. Goldstein: But what we want to know is whether that is the ruling of the Court, that we can't cross examine this witness on cross examination of any sales made in that vicinity subsequent to August 26, 1937. That is the only question I want to put, whether that is the ruling of the Court. This witness is an expert under cross examination and I want to ascertain now if it is the position of the Government or whether your Honor holds that on cross examination we can't ask him and go into sales made in that vicinity, in that territory, in the specific locality that were made from August 26, 1937, up to December 11, 1938.

The Court: That is the position of the Court.

(Testimony of Thomas G. Mapel.)

Mr. Goldstein: Yes. May we note an exception to that, your Honor? [638]

The Court: Yes.

Mr. Goldstein: Very well, I will confine myself to sales prior to August 26, 1937.

Mr. Kefnedy: If your Honor please, does that exception include the parties I represent? If it doesn't, I would like to be heard.

Mr. Goldstein: I take it the ruling applies to all the defendants in the action and it will be understood an exception is taken by all the parties.

The Court: That is correct. [639]

Mr. Goldstein: If, Mr. Mapel, on August 12, 1937 Mr. Charlie House sold to Mr. Deakin a little less than one-third of an acre approximately 100 feet from the present right-of-way of the relocated railroad, on August 12, 1937 for \$500.00, would that make any difference in your valuations as you gave them to this jury?

A. In rendering that value I took out of consideration any increment in value by reason of the project, and while I would consider it, my price or value remains.

Q. I thought you told this jury you took out of consideration any increase or increment from August 26, 1937 to December 14, 1938. Isn't that what you did? Isn't that right?

A. I was referring to the project itself.

Q.. You were referring to the project as a whole, isn't that right? A. Yes.

Q. So, then, if that sale was made on August

(Testimony of Thomas G. Mapel.)

12, 1937 by Mr. House to Mr. Deakin for \$500.00 for less than a third of an acre, it wouldn't change your opinion any that that land was worth only \$10.00 an acre?

A. I would consider that was a price somebody paid Mr. House for the property. That was the price. The value I placed on the [664] land would be a different—rather there is a difference, in my opinion, between price and value.

Q. If Mr. Charlie House sold to Mr. Harold Grundeek on August 12, 1937 a piece of land lying about 600 feet east of the present right-of-way of the relocated railroad, comprising a little less than a half acre for \$500.00, would that make any difference in the estimate of value you gave to this jury in connection with this parcel of property located in Unit No. 4, No. 5, Unit No. 2 and 3?

A. My answer would be the same as in the preceding answer.

Q. It would not change your opinion. As a matter of fact, nothing would change your opinion, isn't that true?

A. Nothing would change my opinion—my conclusion.

Q. That is what I thought. Now, just a few final questions. When you consider the valuation of raw land, or land in a certain locality for which there is no immediate market value, you told this jury that you took into consideration the adaptability, the probable purposes and uses, isn't that true?

A. Yes.

Q. And what the future developments may be in that territory, is that right? A. Yes.

Q. Didn't you also take into consideration the proximity of the land to certain projects or certain things that may happen in the future, whether they materialize or not, in determining the market value of such land?

A. That would be one of the phases, yes.

Q. But you didn't do it in this instance, did you?

A. I eliminated therefrom any increment in value by reason of this project.

Q. I want to get that definitely. You eliminate it completely. [665] I want to get that definitely.

A. That is right. [666]

F. C. HERRMANN

called by the Government in rebuttal, Sworn.

The Clerk: Will you please state your name to the Court and Jury. A. F. C. Herrmann.

Direct Examination

Mr. Landrum: Q. Where do you live, Mr. Herrman?

A. I live in Berkeley, have offices in San Francisco.

Q. How old a man are you? A. Sixty-nine.

Q. What is your business or occupation?

A. Consulting civil engineer.

(Testimony of F. C. Herrmann.)

Q. And of what schools or universities are you a graduate?

A. Graduate of the University of California, 1894, College of Civil Engineering.

Q. Will you be good enough, Mr. Herrmann, to sketch briefly for the benefit of this Court and Jury what experience you have had in connection with the practice of civil engineering and the appraisal and valuation of real estate.

A. Well, after graduating from College I was with my father, who was also an engineer, for two or three years in the partitioning of large Spanish grants. Following that I was engineer in charge of the work for Spreckles Sugar Company in the development through irrigation and drainage of about 25,000 acres in different ranches in the Santa Clara Valley and the Salinas Valley for the purpose of raising sugar beets for sugar factories. Following that I was assistant city engineer—or assistant engineer in the Board of Public Works of the City of San Francisco for five years, on the various problems of water supply, sewage, pavements and so forth. Then I became, through Civil Service examination, the irrigation engineer of the U. S. Department of Agriculture in charge of [685] irrigation investigations and similar subjects as related to agriculture in the central part of the United States. Following that I was assistant chief engineer and chief engineer of the Imperial Valley Project, irrigating about 400,000 acres in Imperial

(Testimony of F. C. Herrmann.)

Valley in Southern California, and 30,000 or 40,000 acres along the Mexican line, going there after the break of the Colorado river and rehabilitating the district, and operating it for four years. Then I became chief engineer of Spring Valley Water Company, who was serving a domestic supply of water for the City of San Francisco. I remained with them until 1915 and resigned to go to private practice, and have been in private practice ever since. In this private practice as consulting engineer I have served as consulting engineer for the Spring Valley Water Company, the East Bay Water Company, the Pacific Water Company, the San Mateo Water Company, the South San Francisco Water Company, Vallejo Water Company, City of Vallejo, the City of Belvedere, and as Consulting Engineer for the Modesto Irrigation District in the rebuilding of the permanent works of their system. And I served as Consulting Engineer for the American Factors in the Hawaiian Islands, in the Island of Hawaii, in their sugar cane troubles. I have served on boards of arbitration to fix the values of properties to be taken by the San Joaquin River Water Storage District, which included water rights, rights of ways for lands and so forth in the San Joaquin Valley. And served as consulting engineer in the appraisal of properties to be taken by the Kern Water Storage District, and also in the San Joaquin Valley. Served as Consulting Engineer for the State of California in several capacities,—

(Testimony of F. C. Herrmann.)

that of the safety of dams under the new laws of the state requiring dams to be built safely, also as [686] consulting engineer for all of the investigations, beginning about 1921, that culminated in the Central Valley Project. In that work we analyzed all the problems so far as irrigation was concerned and developed the original plans, sometimes called the State plan, for the development of waters in this procedure, of which the Central Valley is the area—

Q. Right there, let me ask you: Do you mean you were consulting engineer of the State of California on the Central Valley Project of the State of California which is being referred to in this court here—

A. Yes. We began that work about '20, and carried it up until the Federal Government took it. I also served as consulting engineer in the California State Reclamation Board in the Flood Controls Plans for flood protection and the construction of the necessary works to control the floods of the Sacramento River. And as assessment appraiser for the various assessments for the Project No. 2, Project No. 3, Project 4, Project 5, Project 6, Project 7 and 8.

Q. Of what?

A. Of the Sacramento and San Joaquin Drainage District, which is composed of something like a million and a half acres in the Sacramento and San Joaquin Valleys, and has been carried forward

(Testimony of F. C. Herrmann.)

under the direction of the State Reclamation Board in these units which they call projects—that is these numbers I have given here. Then I was retained as **Consulting Appraiser for the Bureau of Reclamation** for properties to be taken in connection with the Central Valley Project.

Mr. Goldstein: Pardon me; I didn't get that last answer, Mr. Herrmann, retained by who.

The Court: Read the last part of the answer, Mr. Reporter. [687]

(The reporter read the last part of the answer.)

The Court: You may proceed.

A. These various things I have mentioned in which appraisals are concerned are the properties of the San Jose Water Works, Spring Valley Water Company, East Bay Water Company, the Vallejo Water Company, Benicia Water Company, and the Dachutes in Oregon—Dachutes Irrigation Project in Oregon and the Kittitas Irrigation District in Washington, the latter being done for bankers with the idea of investment. The same is true with the so-called Project No. 6 of the State Reclamation Board, embracing about four to five hundred thousand acres, of which a detailed appraisal was made on each piece. And then I made appraisals of the properties in different reclamation districts, District 551, 2047, 108, 1500 and 1600, aggregating, I would say, about 400,000 acres. I am a licensed Civil Engineer of the State of California and of the State of Oregon. I am a member of the

(Testimony of F. C. Herrmann.)

American Society of Civil Engineers, a past director of that organization. I think that covers it.

Mr. Landrum: Q. Now, Mr. Herrman, just one further question: You said you had made appraisals, as I understand it, of millions of acres of land. Of what did those appraisals that you made consist? What did you do? What do you mean by appraisals?

A. Well, determine the value of these lands at that time by making a close investigation of the different tracts of those lands.

Q. And determined the value of them?

A. And determined the value of them.

Q. And you did that for the State of California with relation to approximately how many acres of land?

A. Oh—Oh, I would say all together perhaps 600,000 acres, [688] 700,000 acres, I haven't totaled it up.

Q. Yes. Let me ask you when you first became acquainted with the lands involved in this action.

A. Well, in a general way I became acquainted with them in the investigations we made for the State when we were in the rather preliminary stages, scouting out possible relocations of railroad to replace the present Southern Pacific in case of the Kennett Dam, and then in detail as to these lands my first contact was in the latter part of March and beginning of April, 1936.

Q. State whether or not you were upon the lands involved in this action in the year 1936.

(Testimony of F. C. Herrmann.)

A. I was.

Q. State whether or not at that time you saw the railway or stakes along this line.

A. I did as far as through the Rouge property from Redding.

Q. What about the Kinsella property?

A. Yes. It wasn't the Kinsella then, it was through the Irish property.

Q. Yes, yes. Now, state whether or not you from 1936 on have had occasion from time to time to be upon and visit the lands involved in this action.

A. I have.

Q. Now, have you made an investigation and study of these particular lands in order to qualify yourself to testify in this action?

A. Yes.

Q. Well, now, will you tell the Court and Jury what you have done with relation to a particular investigation of these particular lands involved in this action.

A. Well, went upon the lands, looked them over, and where there were improvements within the areas to be taken, looked them over; obtained what data was available as to sales prices, and then [689] fixed what I thought was a fair market value as of August 26, 1937.

Q. By that do you mean—You may be a little—Well, all right—I want you to tell us now just what minute inspection you made, particularly of the Kinsella property. I want you to tell us what you did there.

(Testimony of F. C. Herrmann.)

A. Well, we went out on the ground, Mr. Hale, Mr. Mellin and myself.

Mr. Kennedy: What was the first name, please?

Mr. Landrum: Hale.

Q. Go ahead.

A. And went to—Drove onto this property, then walked down—walked over the land to be taken, and also the rest of the Kinsella property, looked at the well that was there, examined the dump of the excavation for the well, and looked over the equipment that was there for the purpose of pumping, and the little light plant, and the buildings that were in the area to be taken.

Q. Did you make that same sort of investigation in relation to the other lands in this action?

A. Yes.

Q. Will you tell this jury, if you know, what the condition—

Mr. Kennedy: When did you do that?

Mr. Landrum: Q. When did you do that with relation to the Kinsella well, counsel would like to know.

A. It was in January 1940. When we went on the Kinsella property before that, in 1936, the property wasn't there.

Q. Now, tell us what was there when you went on it in 1936. A. Well, nothing but brush.

Q. What was this other land when you went on there in 1936, Tract No. 7, 4 and 5.

A. Nothing except brush, natural growth, brush and trees. It was in its natural form. [690]

(Testimony of F. C. Herrmann.)

Q. Mr. Herrmann, have you been furnished with information with relation to the acreage being taken by the United States in each of these parcels of land? A. I have.

Q. Have you been present in the courtroom throughout the trial of this case and have heard the testimony with relation to the facts as given on that witness stand?

A. That is true with the exception of perhaps an afternoon session when I didn't attend.

Q. Are you able to give an opinion with relation to the fair market value of these lands?

A. I am.

Q. Now, Mr. Herrmann, I will ask you whether or not from your experience in connection with the appraising and the handling and the valuation of real estate, and your own personal investigation of the lands involved in this action, and the testimony which you have heard in this case with relation to the facts, do you have an opinion of the reasonable and fair market value of that portion of the so-called Van Santen land in Parcel No. 1 involved in this action as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the so-called Central Valley Project of the United States from and after August 26, 1937?

A. I have.

Mr. Goldstein: Just a minute, if the Court please, in order to save time I object to the form of the question and object to all of the testimony

(Testimony of F. C. Herrmann.)

based upon the same questions upon the previous grounds given to the Court, that that is not the proper measure of damages, and I want to simply preserve the record on that, these questions put by counsel are the same as the questions put to Mr. Mapel, which he found was the market value as of December 14, 1938 excluding any increase or increment in that value from August [691] 26, 1937, and so it is understood our objection goes to all of them on the ground it is incompetent, irrelevant and immaterial, and not a proper measure of damages.

The Court: Objection overruled.

Mr. Landrum: I am so willing to stipulate that you may have that objection to all the questions.

Mr. Kennedy: We make the same objection and note the same exception.

The Court: To each similar question?

Mr. Kennedy: Yes, in respect to the Kinsella property.

Mr. Stimmel: The same objection.

The Court: It will be understood that the exception will be noted.

Mr. Goldstein: Yes.

Mr. Landrum: Q. What is your opinion of that value, Mr. Herrmann?

A. Well, in my opinion the value of the Van Santen strip, 5 foot strip, is \$1.70, but I say it should be given a value of \$10.00.

Q. I want you to tell us how you arrived at that \$1.70.

(Testimony of F. C. Herrmann.)

A. Well, that \$1.70 represents a frontage of 5.2 feet on the boulevard, Grand Coulee Boulevard, or an area of $1\frac{1}{4}$ -100ths of an acre, 5.2 of a foot at $33\frac{1}{3}$ cents per lineal foot gives \$1.70.

Q. Mr. Herrmann, from your experience in connection with real estate, and the valuation thereof and the appraisal thereof, do you have an opinion with relation to whether or not there is any damage to the remainder of the so-called Van Santen portion of Parcel No. 1 herein as of December 14, 1938, leaving out of consideration any increase or increment thereto by virtue of the [692] so-called Central Valley Project of the United States from and after August 26, 1937.

A. In my judgment there is none.

Q. Then, you would say that it is your opinion that by virtue of the taking of the 5 foot strip out of the Van Santen property there is no damage to the remainder of that property?

A. That is my judgment.

Q. Now, Mr. Herrmann, from your experience in connection with the appraisal and valuation of real estate, and your own personal inspection of the land involved in this action known as the Rouge portion of Parcel No. 1, and the testimony which you have heard in this court with relation to the facts, do you have an opinion of the fair market value of that portion of the Rouge tract taken in this proceeding as of December 14, 1938, leaving out of consideration any increase or increment

(Testimony of F. C. Herrmann.)

thereta by virtue of the so-called Central Valley Project of the United States from and after August 26, 1937? A. I have.

Q. What is your opinion of that value, sir?

A. My opinion of that value is \$13.32.

A. That is for $4 \frac{3}{4}$ of a hundredths of an acre, $4 \frac{3}{4}$ -100ths of an acre.

Mr. Landrum: Q. Mr. Herrmann, let me ask you this: For what use or uses was that land adaptable and available under the question as I have asked of you at that time or in the immediate future after that time? What was it suitable for?

A. Well, they might have put a little house on there if you wanted to be on the County Road. It is such a small tract, of course, it had no agricultural value as such. [693]

Q. Now, from your experience in connection with the appraisal in valuation of real estate, and your own personal investigation of that property, and the testimony you have heard in this courtroom as to the facts, is there any damage to the remaining of the Rouge tract under that date and under the same conditions? A. There is.

Q. What is your opinion as to the damage to this Rouge parcel or Parcel No. 1 by virtue of the taking therefrom of the land which the Government has taken?

A. I worked out a figure of \$6.47, which added to the \$13.32 makes \$19.79, but I say give them \$20.00.

Q. It figures \$19.79, but you say give them \$20.00? A. \$19.79.

(Testimony of F. C. Herrmann.)

Q. You are making your figures in round figures? A. Yes. [694]

Q. Mr. Herrmann, you, of course, are familiar with the Parcel No. 4 in this action known as the Johnson land? A. Yes.

Q. From your experience in connection with the appraisal in valuation of real estate, and your own personal inspection of that property, and the testimony you have heard in this courtroom with relation to the facts, do you have an opinion as to the fair market value of that property—

A. I have.

Q. (Continuing:) —as of December 14, 1938, leaving out of consideration any increase thereto by virtue of the so-called Central Valley Project of the United States from and after August 26, 1937? A. I have.

Q. What is that opinion of that value?

A. The value of the land itself, I think, is \$48.10.

Q. That is the part taken?

A. That is the part taken.

Q. In your opinion is there any damage to the remainder of that parcel? A. There is.

Q. What in your opinion is that damage?

A. \$107.25, making a total of \$155.35, which I round out to \$160.00.

Mr. Goldstein: I didn't get that.

Mr. Landrum: Rounded it out to \$160.00 on the Johnson tract. [696]

Q. You haven't been cutting your figures down?

(Testimony of F. C. Herrmann.)

Mr. Goldstein: He has been very generous.

A. I think they are exceedingly generous. You are asking for my opinion?

Mr. Landrum: Q. Yes, he asked for it.

Q. Mr. Herrmann, do you have an opinion with relation to the fair market value of that portion of the Agnew property based upon the same hypothetical question which I have been asking you and under the same conditions and considerations which I have been asking you with relation to this other property? A. I have.

Q. What is that opinion of the part taken from Mr. Agnew?

A. Well, there again I have 20 cents, which I say found out to \$10.00.

Q. In your opinion is there any damage to the remainder of the Agnew property?

A. None whatever.

Q. Now, Mr. Herrmann, I want you to tell this jury from your inspection of that property whether or not there is still access to that back door after this property is taken. A. Yes.

Q. How? A. Access from Chico Street.

Q. From what?

A. Chico Street is alongside the lot.

Q. What do you say is the total damage to the Agnew property by virtue of this taking?

A. \$10.00.

Q. You say in your opinion there is no damage to the remainder of this property?

(Testimony of F. C. Herrmann.)

A. That is my judgment.

Mr. Kennedy: Mr. Landrum, may I ask the figure on the land taken? [698]

Mr. Landrum: He said 20 cents.

Mr. Kennedy: For the land taken?

Mr. Landrum: What is it?

A. The figure is 20 cents, but I round it out to \$10.00.

Mr. Landrum: And he found no severance.

Mr. Kennedy: Thank you.

Mr. Landrum: Q. Now, Mr. Herrmann, to go to the McConnell property, being Parcel No. 7. Do you have an opinion of the fair market value of the portion of that taken by the United States, based upon the same hypothetical question and under the same conditions I have asked you with relation to these other parcels? A. I have.

Q. What is your opinion of the value of the part taken, the McDonnell property? A. \$219.99.

Q. In your opinion is there any damage to the remainder of the McConnell property by virtue of the taking of that which the United States is taking in this action? A. There is.

Q. What in your opinion is the damage to the remainder of the Parcel No. 7, McConnell?

A. \$10.50.

Q. Then what is your total of McConnell, that is, including the land taken and what in your opinion is the damage to the remainder?

A. \$230.00.

(Testimony of F. C. Herrmann.)

Q. Does that figure out exactly \$230.00?

A. No, that is rounded out from \$229.50. [699]

Cross Examination

Q. May I assume, take it for granted, you placed your valuations upon that property as brush land or squirrel land?

A. Nothing about squirrels.

Q. Leave out the squirrels or the trees; just let it stand as brush land, plain, ordinary unadulterated virgin brush land.

A. That land as it was at the time of the taking without enhancement after August 26, 1937: Now, I have seen those lands going through these several times each year since 1936. The first time I went there was in 1936. When we were asked to look over the railroad right-of-way up as far as here through the Rouge property, there were occasions when we called out there, and a number of times each year since.

Q. By the way, who were you working for at that time in 1936 when you say you went on this property?

A. I was retained as consulting appraiser for the Bureau of [705] Reclamation.

Q. Then you were working for the Bureau of Reclamation at that time, in 1936? A. Yes.

Q. Were you working for them in 1937?

A. Yes.

Q. When were you on the property in 1937?

(Testimony of F. C. Herrmann.)

A. I have forgotten just what dates now, but we were over, passed the property, or through it several times in 1937 and also in 1938 and also 1939.

Q. I take it you didn't see any activity around there in 1937 at all in connection with this property other than the brush land?

A. Just the very beginning—

Q. I see, just a mushroom—

Mr. Landrum: Just a moment. Let him answer.

The Witness: The end of 1937, if I remember correctly, the first house was built there in Boomtown—November, 1937. [706]

Mr. Goldstein: I am going to ask him if this happened, if it made any difference in his appraisal.

Mr. Landrum: I will withdraw the objection.

Mr. Goldstein: Let me do it this way: I am going to read to the jury paragraph 4 of the Declaration of Taking on page 15-d. Fourth. "The sum estimated by me"—I will have to say who this is. This is the Assistant Secretary of the Interior, I believe it is Mr. Harry Slattery—I am not entirely sure—let me get his name; yes, Mr. Harry I. Slattery, Acting Secretary Interior of the United States, and after recital of the various acts we come to the last paragraph, 4: "The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereunto belonging, and including any and all interests whatsoever subject to the ease-

(Testimony of F. C. Herrmann.)

ments hereinbefore stated, is \$10,360.00, which sum is divided into—

Mr. Landrum: All right, if you are dividing it.

Mr. Goldstein: I am reading the whole thing. Don't be worried, Mr. Landrum, I am not going to do anything but fair. I don't do anything wrong, I assure you. .

“—divided into \$300.00 for said ownership 1”—

Mr. Landrum: What is that ownership number 1?

Mr. Goldstein: Ownership number 1 is Parcel number 1. [715]

Mr. Landrum: That includes the Van Santen, Rouge and Kronschnabel, doesn't it?

Mr. Goldstein: I will explain it later, I—

Mr. Landrum: I want you to explain it now.

Mr. Goldstein: I can't explain the document and read it at the same time. I will read it and then I will explain it. (Reading): “\$300.00 for said Ownership 1, \$5,700.00 for said Ownership 2, \$1,110.00 for said Ownership 3, \$510.00 for said Ownership 4, \$140.00 for said Ownership 5, \$50.00 for said Ownership No. 6, and \$2,550.00 for said Ownership 7, which sum I hereby deposit in the registry of this Court for the use and benefit of the parties entitled thereto. I am of the opinion that the ultimate award for said land will probably be within the limits of allocations and allotments made and provided for the purchase of said land.

“In witness whereof, I have signed this Decla-

(Testimony of F. C. Herrmann.)

ration of Taking and caused the seal of the Department of the Interior to be affixed on this ninth day of November, A. D. 1938, in the City of Washington, District of Columbia."

Q. Now, calling your attention to this, you were a member of the Board of Appraisers who fixed these figures in 1938, weren't you?

A. We fixed some figures in 1938; whether they agree with these, I don't know. When I say "We fixed them," we made recommendations, and the Secretary of Interior, what he did, I don't know.

Q. That Board of Appraisement consisted of you, Mr. Hale and Mr. Mellin, as you have told us? Now, Ownership No. 1 includes the Van Santen property, which you appraised at 20 cents, it includes the Rouge property, which you appraised at \$10.00, and it includes also the Kronschnabel property, which you appraised at \$80.50? That is Ownership No. 1? That is correct? [716]

A. Well, I presume so.

Q. I gave you the figures just as you gave them. Would these figures, the figures which I just gave you now, which was put into this Declaration of Intention, in any way change your values?

A. No.

Mr. Landrum: Now, wait a minute—

The Court: I think that is a fair question.

Mr. Goldstein: I beg your pardon?

The Court: I am addressing my remarks to Mr. Landrum.

(Testimony of F. C. Herrmann.)

Mr. Landrum: What I want to call the Court's attention to is that these figures just read have reference to other properties in addition to these we have been trying here.

The Court: You can bring that out.

Mr. Goldstein: I am not asking him about other properties.

Q. Ownership No. 1 contains the Van Santen, the little Rouge piece, and the Kronschnabel? That is correct? Isn't that true, Parcel No. 1? That is correct? . . . A. Yes, sir.

Mr. Goldstein: Now, may we stipulate the amount paid in on that? \$300.00?

Mr. Landrum: That is all of Parcel 1, including Van Santen, Rouge and Kronschnabel.

Mr. Goldstein: That is right.

Mr. Landrum: \$300.00.

Mr. Goldstein: \$300.00. And the question I am asking the witness, he valued the Van Santen piece at 20 cents, the Rouge piece at \$10.00 and the Kronschnabel piece at \$80.50, which would be approximately \$100.00 for all three parcels. Now, I am asking you whether—if you, a member of the Board of Appraisers in 1938, knew this figure was deposited in court, would this figure change your value you have testified to as to Parcel No. 1? [717]

A. No, not under the conditions—

Q. Well—

A. Wait a minute; permit me to finish my answer.

(Testimony of F. C. Herrmann.)

Q. All right, go ahead.

A. Certain conditions were put on these appraisals and the figures I have given the jury and the judge today, and that was the condition there should be excluded from it any enhancement in value due to the project between August 26, 1937 and the date of taking, which was December 14, 1938. Now, the difference—when we made those appraisals you have there, we didn't have this instruction with regard to the enhancement in value due to the project, and it wasn't under that condition that those appraisals were made. Those appraisals have in them the enhancement as we saw it in the project up to the date of that appraisal.

Q. In other words, you claim that Secretary Slattery of the Department of Interior—Acting Secretary—deposited into this Court money including the increase in value due to the Central Valley Project from August 26, 1937 to December 14, 1938?

A. No, I don't claim anything.

Q. What do you claim?

A. I am telling you this: I don't know what Assistant Secretary Slattery did, and the facts are these: That in the appraisal of 1938 that we made of that property there was in it this enhancement there which had been due to the Central Valley Project itself. Now, in the appraisals we have gone forward with today,—under the instructions of the attorneys and the Court,—the enhancement in value subsequent to August, 1937, is not included. [718]

Saturday, February 10, 1940

10:00 o'clock A. M.

CHARGE TO THE JURY

The Clerk: United States vs. Certain Parcels of Land.

The Court: The Clerk will call the roll of jurors. (The Clerk called the roll of jurors, all answering present.)

The Court: Ladies and Gentlemen of the Jury: It is the duty of the Court to explain to you the issues in the cases which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of law by which you must be guided in your deliberations. It is your duty to accept these instructions as correct, and, so far as the law of the case is concerned, be guided by them.

Under the Fifth Amendment to the Constitution of the United States, it is provided that private property shall not be taken for public use except upon the payment of just compensation. You will note that the thing that the private owner is entitled to when his property is taken for public uses is "just compensation."

The Government of the United States possesses what is known in law as the "power of eminent domain". This means that in the exercise of its legitimate powers it has the right to take private property whenever such property is necessary for the public use. In the exercise of that power the

Government institutes an action which is commonly referred to as a "condemnation proceeding," whereby it acquires title to the property of the individual upon condition that it pay "just compensation" to the owners for the property of which they are deprived.

In this particular case the Government in the exercise of its powers of eminent domain has taken for public purposes certain tracts of land in Shasta County.

I instruct you that the property of the defendants that is [735] involved in this case has been lawfully and properly taken in eminent domain proceedings by the United States of America for public use, and the right of the Government so to take it is in no way involved in your deliberations. The owners of the property involved are entitled to just compensation for this taking. You are required to find the market value of the property at the time of its taking. The controlling dates in this case are: December 14, 1938, and December 9, 1938, those being the dates when the property in question was taken by the Government.

In this trial we are actually trying six cases because there are actually six separate parcels of land involved. For clarity each of them has been given a number. As to each the following applies:

Parcel No. 1—the so-called Rouge tract.

This tract is being acquired by the government in fee simple, subject to an easement of the Pacific Telephone & Telegraph Company, an easement of

the Pacific Gas and Electric Company, and reserving to the County of Shasta an easement in and to that portion of the existing county road lying within this parcel. This parcel is divided into three ownerships. Ownership One is the so-called Van Santen ownership. The total Van Santen ownership consisted of 0.0965 acres. Out of that 0.0965 acres the government is acquiring title to .0125 acres, leaving the owner a balance of 0.084 acres. Ownership Two is the so-called Rouge ownership. The total ownership consisted of 0.588 acres. Out of that 0.588 acres the government is acquiring title to 0.047 acres. The remainder of this parcel is the so-called Kronschnabel ownership. The government is acquiring all of this ownership containing 3.1105 acres. Just where these ownerships and parcels are located is disclosed by the maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 4—the so-called Johnson tract. [736]

This tract consisted of 17.81 acres. Out of that 17.81 acres the government is acquiring title to 4.81 acres in fee simple, leaving the owner a balance of 13 acres. Just where this 4.81 acres is located in the entire parcel is disclosed by the maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 5—the so-called Kronschnabel tract.

This tract consisted of 5.28 acres. Out of that 5.28 acres the government is acquiring title to 1.31 acres in fee simple, leaving the owner a balance of 3.97 acres. Just where this 1.31 acres is located in

the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 6—the so-called Agnew tract.

This tract consisted of 0.47 acres. Out of that 0.47 acres the government is acquiring title to 0.02 acres in fee simple, subject to an easement of the Pacific Telephone and Telegraph Company, leaving the owner a balance of 0.45 acres. Just where this 0.02 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

Parcel No. 7—the so-called McConnell, Miller and Humphrey tract.

This parcel consisted of 11.05 acres. Out of that 11.05 acres the government is acquiring title to 10.61 acres in fee simple, subject to an easement of the Pacific Telephone and Telegraph Company, leaving the owner a balance of 0.44 acres. Just where this 10.61 acres is located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 14, 1938.

In case No. 4034-L, which has been consolidated with case No. 4027-L, there is one parcel of land involved.

Parcel One—the so-called Kinsella parcel.

This parcel consisted of 1.968 acres. Out of that 1.968 acres [737] the government is acquiring title to 0.36 acres in fee simple, leaving the owner a balance of 1.608 acres. Just where this 0.36 acres is

located in the entire parcel is disclosed by maps in evidence. The date of taking as to this parcel is December 9, 1938.

You are instructed that it is your duty to award to each of the defendants, respectively, the full market value of their respective properties sought to be condemned.

In determining the value of the property sought to be condemned, the rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value, in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable or adapted. Any existing facts which enter into the value of the land in the public and general estimation and tending to influence the minds of sellers and buyers, may be considered.

The market value of the property sought to be condemned is the measure of damages to be assessed for its taking and not its value in use to the defendants or to the plaintiff. The question for you to determine is what the property was worth in the market on December 14, 1938, in the one case, and on December 9, 1938, in the Kinsella case.

In considering the amount of compensation to be awarded to the defendants you must take into consideration two elements—first, the reasonable market value of the property taken as of the dates referred to; secondly, any damage sustained by the defendants by reason of the severance of the prop-

erty so taken from the other property owned on that date by the defendants respectively.

In determining the market value of the lands which in this case have been taken for public use, the same considerations are to be [738] weighed by you as in the case of a sale of property between private persons. The inquiry in the case must be: What is the property reasonably worth in the market, viewed not merely with reference to the use to which it was put at the time this action was begun, but with reference to any and all uses to which it was reasonably and practically adapted within the reasonably near future.

The location of the property, its surroundings, and all other things are to be considered, but you are not to indulge in speculation or conjecture. In ascertaining the market value, you may consider the purposes for which the land is adapted, and the price for cash it would bring on the market for any purpose, allowing a reasonable time in which to find a purchaser.

Market value is the amount the property would sell for if put upon the open market and sold in the manner in which property is ordinarily sold for cash in the community where it is situated, with a reasonable time being given to find a purchaser and make the sale, and having in mind all of the purposes to which it is naturally adapted.

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between

private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for all valuable uses. Property is not to be deemed to be worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life; its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances [739] to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to existing business or wants of the community, or which as may be reasonably expected in the immediate future.

So many and varied are the circumstances to be taken into account in determining the market value of the various kinds of property condemned for public use, that it is impossible to formulate an exact rule to govern its appraisal in all cases. In general, the most profitable use for which the property is adaptable and needed, or likely to be needed

in the reasonably near future, is to be considered, not necessarily as to the measure of value, but, to the extent that the possible demand for such use affects the market value. You should consider all the uses for which the property is reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the reasonably near future. The market value of land taken for public use includes its value for any use to which it may reasonably and practically be put, and all of the uses for which it is reasonably and practically adapted, and not merely the condition in which it is found at the time of the taking, and to which it was applied by the owner at that time.

Its reasonable availability for uses which are of such a character as to be reflected in the market value of the property at the time it was taken should be taken into consideration in determining the fair market value of the property, and the just compensation to the owner. [740]

As I have said, the market value of the property taken is the price which considering all the circumstances disclosed by the evidence it would bring if offered for sale in the open market for cash by an informed person who desires to but is not obliged to sell it, and if purchased by an informed purchaser who is desirous of buying but under no necessity of purchasing. These two elements taken together, namely, a seller willing but not required to sell and a buyer willing but not required to buy, go to

make up market value. In determining the value, all of the capabilities of the property, and all the uses to which it may be applied, or to which it is reasonably adapted, may be considered, having regard to the existing business or wants of the community or such as may reasonably be expected in the reasonably near future. It is not the value to the owner that you are to consider. It is the full, fair, cash market value of the property as of the date it is taken.

In arriving at the fair market value of these lands you are not to fix speculative, boom or fancy values, on the other hand, you are not to fix depression or forced sale values, because the law requires you to determine the fair reasonable market salable value of the property, if the owner was offering to sell on usual terms and under ordinary circumstances and the purchaser desired to buy.

You are instructed that in determining the damage, if any, to the lands not taken, you are to take into consideration all the facts and circumstances established by the evidence in this case, bearing upon the extent of such damages.

Evidence has been introduced in this case for the purpose of showing that the property taken is valuable for certain purposes, and that the property has certain advantages and could be put to certain advantageous uses by reason of its location, and by reason of its adaptability to certain specific purposes. Such evidence [741] should be taken into consideration by you in determining the

market value of the property taken, and the damages, if any, to the property not taken. And it is proper for you to consider the evidence that has been introduced as to the uses to which the property can be put, for the purpose of assisting you in determining the question as to what was the market value of the property taken upon that date.

The government may not be required to pay any increase in the value of the property which it has caused by reason of its contemplated taking of the property by eminent domain proceedings. Any rise in value before the taking should be allowed to the property owners but not any rise caused by the expectation that the government intended to condemn the property.

As you have already heard, this property is being taken for the so-called Central Valley Project. If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937, such increase or enhancement in value is not to be considered by you. The value you are to fix and award as compensation is the value this land would have had had this project not been announced, planned or constructed on August 26, 1937. It may be that because of this project the use for which the property is suited may have changed. You should consider it only for the use to which it was suited or adapted before that use was changed by the project. The govern-

ment must not be required to pay for something it has itself made.

You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which [742] may have occurred from and after that date which you may find was attributable to the announcement of plans for or construction of this project.

The question of the amount of compensation to be awarded to the defendants is not a question of what the property taken would have been worth to the defendants respectively if they had decided to retain the property taken, because it may possess a greater value to them than it had on the open market. The question for you to consider is this— if the defendants had desired to sell the property taken from them, respectively, by the government, what could they have obtained for it upon the market, being allowed a reasonable time in which to find a purchaser who was buying with a knowledge of all the uses and purposes to which the property was adapted?

Although the value of the land taken by the government must be estimated on the basis of its value for all purposes including its value as a potential subdivision (if you find that it has a value as such potential subdivision which was not due to the project itself) nevertheless you may not take into

consideration the price that its owners might have been able to obtain for the land after such subdivision had actually taken place.

You are instructed that the defendants, respectively, are entitled to recover not only for the damages to the lands not taken by reasons of its severance from the portion sought to be condemned, but are also entitled to damages, if any, to the portion not taken by reason of the construction of the improvements in any manner consistent with the use proposed by the plaintiff.

Determination of such damages is exclusive with the jury.

Not only does the burden rest on the defendants to prove the damages sustained by them by reason of the property that is taken [743] by the government but the burden also rests on them to prove the damages, if any, to the residue of the property belonging to them which is not taken.

What is meant in law by what is sometimes called "consequential damages", or sometimes called "severance damage", is this: that where a part of a larger tract of land is appropriated for public use, it is competent for the jury to take into consideration in assessing compensation to the owners the damage to the remainder of his contiguous tract which has not been taken, caused by severing from it that which is taken. We call it severance damage because it is due to the severing from the larger tract of a part of it. We call it conse-

quential damage because it is the damage which results in consequence of that severance, and where a smaller from a larger area is taken, the damage, if any, resulting to the part not taken is severance or consequential damage. Now, in arriving at the severance or consequential damage to the property which the government has not taken, I instruct you that this is the measure by which to ascertain that amount: It is the difference between the fair, cash market value of the property not taken before the severance took place, and its fair, cash market value after the severance takes place—taking into consideration all the facts and circumstances and conditions as disclosed by the evidence. If the remainder of the property, or the property not taken is left in a less advantageous condition than it was before, then it is your duty to determine to what extent its value has been impaired in consequence of the severance. You must value it for what it would be worth if the government had not taken a foot of his property, and then value it for what it would be fairly worth in the market in the light of the changes which the severance has brought about, and the difference between [744] these two amounts is the consequential or severance damage to be awarded for the land not taken.

We must treat the defendants and the government with absolute fairness. The defendants ought to receive every dollar that they are entitled to receive, and on the other hand they ought not to receive a dollar more than they are entitled to. They

should not be made any richer and they should not be made any poorer by reason of this proceeding. On the other hand, the government ought to pay every dollar it owes them, but it ought not to pay a dollar more than it owes them. The situation is exactly the same as if the suit was between two individuals.

With reference to the subject of severance damages I instruct you that such damages, if you find that they were suffered by the defendants by the taking of their property, must be based upon some disturbance of a property right which naturally tends to and actually does decrease the market value of their property.

The fear of a remote or contingent injury which may possibly occur but the happening of which is altogether speculative and uncertain is not regarded by the law as an element entering into the damages which may be allowed to an owner of property. The damage sustained in order to be allowed by you in your verdict must be direct and proximate and not such damage as is merely possible or may be conceived by the imagination.

If you find that by taking the right-of-way for the use described in the complaint, damages will result to the property that is not taken, then it is your duty to consider the shape and size of the parcels which remain, the increased difficulty caused by the taking, if any, in getting to or upon these parcels, or in going to or from one portion to the other thereof, and any inconvenience and disfigure-

ment of the property remaining, if any, [745] which may be caused by the taking and any interference with future development of the land for any purposes for which it may be adapted, or to which it may be applied, and insofar as you may find that any of such conditions depreciate the market value of the property and are the result of taking the right-of-way which the plaintiff seeks to condemn, you will award the defendants damages therefor.

The necessities of the government in acquiring the property must be taken into consideration—Strike that. You are to disregard that statement.

The necessities of the government in acquiring the property must not be taken into consideration, nor must any unwillingness to sell the property by the owner be taken into consideration by you in your deliberations.

In determining the fair, cash market value of the property sought to be condemned, you will not permit yourselves to be in any way influenced by the character of the plaintiff as the Government of the United States. You will, in determining the amounts to be paid by the government to the defendants as compensation for the taking thereof, proceed in precisely the same spirit of fairness that you would exercise if you were sitting as finders of fact to determine the value of such property between owners who were willing to sell and a private purchaser who was willing to buy, where such parties had agreed that such property should be

sold at a fair, cash market value, and had submitted to you as finders of fact the question of determining what that fair, cash market value was.

You will understand that in ascertaining the fair, cash market value of property as of a particular time, the law has no accurate mathematical standard by which that amount can be ascertained. Much must be left to the sound judgment and good common sense of a conscientious jury. In your deliberations there is no room for sympathy or sentiment or prejudice or passion. You must decide [746] the case without regard to personalities and be guided, so far as the law is concerned, solely by the instructions of the Court, and so far as the facts of the case are concerned, solely by the testimony of the witnesses.

By order of the Court you went upon the property involved in this action and viewed that property so that you might have a more intelligent understanding of the evidence. You should use the result of your observation of that property, together with all the other evidence in the case in arriving at your verdict.

I have heretofore instructed you in regard to certain of the principles of law pertaining to the amount of compensation to be awarded to the defendants in this action, for the land taken. You should bear in mind that such compensation is the reasonable market value of the land at the time it was taken by the government and not any future value that the land may hereafter have, since no

human tribunal is able to determine judicially what value land may have at some future time.

You are further instructed that whatever purpose the defendants had in connection with the future use of the land does not determine its market value.

A use existing or contemplated on property is distinct from the market value of the land itself and is not the conclusive basis for fixing such market value and is not to be considered as determining the value of the land. Value in use may be considered as evidence of market value, but is not to be considered by you as determinative of the market value of the property.

You are instructed that mere infringement of the owners' personal use of property or merely rendering the property less desirable for certain purposes, or even causing personal annoyance or discomfort does not constitute a damage for which compensation [747] should be made, unless the property thereby suffers some diminution in substance, or is thereby depreciated in its market value.

In determining the damages, if any, in this case, to be awarded to the defendants, you must consider the damage to the land and the improvements pertaining thereto only and are not to take into consideration any damage to or loss of any business conducted on said land, if you find that there is any damage or loss of business.

The owner of land abutting on a street or highway has a private right in such street or highway

distinct from that of the public for the purpose of access to and egress from his land which cannot be taken nor materially interfered with without just compensation and this is so although another owns the fee in the highway.

An abutting property owner owning a public highway is not entitled as against the public to access to his land at all points—Strike that out. I will reread it.

An abutting property owner on a public highway, is not entitled as against the public to access to his land at all points in the boundary between it and the highway, although entire access cannot be cut off or materially interfered with; and if he has free and convenient access to his property and his means of ingress and egress are not substantially interfered with by the public, he has no cause of complaint and the United States is therefore not liable for any damages in relation thereto.

The just compensation assured by the Fifth Amendment to an owner, part of whose land is taken for public use, does not include compensation for diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

You are instructed that, after you have determined the market value of the strip of land sought to be condemned for the construction of improvements in the manner proposed by plaintiff, you must then ascertain and assess the amount of dam-

ages, if any, [748] which accrue to the portion not sought to be condemned by the plaintiff. This damage, if any, will be determined by ascertaining the market value of these portions of lands not taken as it was on the respective dates of taking in these cases, and by deducting therefrom the market value of said property after severance and the construction of improvements in the manner proposed by plaintiff. The difference between these values, if there shall be any, will be the amount of damage done to the part of said land not taken, by the severance and construction of improvements as proposed by plaintiff.

In this case, the damages are assessed and compensation made once or all, and this proceeding will forever bar the defendants and all persons holding under them from any future claim for damages resulting from the taking of the right-of-way through their properties. The compensation is, therefor, to be determined according to the full measure of the rights acquired by the plaintiff, and not necessarily according to the mode in which it proposes to exercise those rights in the first instance.

You are instructed that in determining the damages, if any, which will accrue to the land not taken, by reason of its severance from the strip of land taken, you should take into consideration every element of annoyance, disadvantage or inconvenience, if any, resulting from the appropriation of the land which would involve the reasonable judg-

ment of an intending purchaser as to the market value of the property involved.

If you find that by taking the right-of-way for the uses and purposes for which it has been condemned by the government, damage will result to the larger tract or parcel of which the portion sought for a right-of-way is a part, then you will consider the dimensions and location of the tract or parcel sought to be [749] condemned for the right-of-way, the purpose for which it is to be used, the manner in which the improvement is to be constructed, the effect, if any, that it will have upon the severance of the larger tract or parcel, its natural configuration, the situation, condition or shape in which it will be placed, the improvements thereon, and the uses to which it is best adapted, for the purpose of determining the market value of the property taken and for the purpose of determining the market value of the portion of the larger tract not taken, to ascertain the damage, if any, to the part not taken.

You are instructed that where land is condemned for public uses, the value of the land at the time of taking, together with all the buildings or other improvements and fixtures thereon pertaining to the realty must be considered in determining the owner's compensation.

You are instructed that the defendant, David Wilson Agnew, is entitled to recover as compensation and damages in this action, the following items:

1. The market value, as of December 14, 1938, of the land sought to be condemned, which land is described in the complaint of this action;

2. The damages, if any, as of December 14, 1938, to that portion of the tract owned by said defendant, David Wilson Agnew, which is not to be taken for the proposed right-of-way, by reason of its severance from the portion sought to be condemned and by reason of the construction of any improvements that may be reasonably adapted to the proposed use.

The Court instructs you that in the action which has been referred to as the Kinsella suit and which affects the Kinsella property, the government is acquiring title in fee to 0.36 acres [750] of land taken off the easterly side of the Kinsella property, "together with all and singular the water rights and other rights, tenements, hereditaments and other appurtenances thereunto belonging or in any way appertaining."

For this taking the government must compensate the defendants Thomas Kinsella and Juanita Kinsella for the market value of the land taken with all improvements thereon pertaining to the realty, and for the damages, if any, which will accrue to the portion not taken, by reason of its severance from the portion taken, and the construction of the improvement in the manner proposed by plaintiff. The amount to be paid must be ascertained and determined by the jury. As far as practicable you shall assess the compensation for each source of damage separately.

First: You should determine the market value of the parcel of the Kinsella land taken by the government with all improvements thereon pertaining to the realty.

Second: You should determine the damages, if any, which will accrue to the portion of said defendants' land not sought to be condemned, by reason of its severance from the strip of land which is taken by the government, and by reason of the use of said strip of land for a railroad in the manner proposed by plaintiff.

In fixing the compensation to which defendants Kinsella are entitled, you are instructed that said defendants are entitled to recover such sum as you believe from the evidence constitutes the market value of the strip of land taken by the government, with all the improvements thereon pertaining to the realty, considering said strip of land in relation to the entire tract of which it is a part, and also such other direct damage, if any, as you may believe from the evidence resulted to the remainder of the tract by reason of the situation, condition, or shape in which [751] it has been placed, and such additional improvements, if any, as may be necessary to the reasonable enjoyment of the tract; but the amount of damages in any event should not exceed the difference between the market value of the land as an entirety immediately before, and the market value of the land as an entirety immediately after the taking.

By its complaint in the Kinsella case and the judgment on the declaration of taking, the government not only has taken the parcel of land condemned for the railroad, but has taken also "the water rights and other rights, tenements, hereditaments and other appurtenances thereunto belonging or in any way appertaining"; the evidence in said case shows that the plaintiff in taking the strip of land condemned for the railroad has taken a well located and operated by the defendant on said strip of land.

The Court, therefore, instructs you that the defendants Kinsella are entitled to compensation for the taking of said well and said water rights, and insofar as you find that the taking of said well and said water rights, and the severance of same from the land not taken, has depreciated the market value of said portion of the Kinsella tract not taken, you should award damages therefor in arriving at your verdict in the Kinsella case.

Owners are presumed to know the value of their property, and being permitted under the law to testify thereto, their evidence in that regard is entitled to be weighed and considered by the jury.

Testimony has been given on the trial of this action by persons who are commonly referred to as expert witnesses. An expert witness is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation and practice. Expert [752] testimony is the opinion of such a

witness, based upon the facts in the case, as shown by the evidence. Before you can give any weight to expert testimony you must first find from the evidence that the facts upon which it is based are true. Expert witnesses were called to testify in this case because they indicated, by a statement of their qualifications, that they had given the subjects in regard to which they testified, particular study. It therefore becomes important for you to consider the evidence, and to determine whether the facts referred to by those witnesses as the reason for their opinions of the value of the property involved, actually exist. If the facts upon which any of those expert witnesses base their opinions are not true, then the opinion of such expert has its value impaired to the extent that the facts assumed are found by you not to be true.

The opinions of the real estate experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon such opinion to the exclusion of other testimony. Taking into consideration those opinions, and giving them just and proper weight, you are to determine for yourselves from the whole evidence what was the reasonable market value of the property taken by the government on the dates when the property in question was taken by the government.

Where witnesses qualify as experts in a particular field of knowledge or learning, and are called to the witness stand and allowed to express opinions,

those opinions are for the aid and the assistance of the jury and not for the purpose of invading its functions. The responsibility of decision rests upon the jury. It is your duty to evaluate and appraise the testimony of the witnesses who express opinions, precisely as you are called upon to evaluate the testimony of witnesses who testify to facts. It [753] is for you, in the light of all the circumstances as disclosed during the progress of this case, to place that weight and give that credit to the testimony of each witness which you conscientiously believe, in the exercise of sound judgment and good sense, it is entitled to have at your hands, and no more.

In arriving at a verdict it is your duty not only to weigh with care and scrutiny all the testimony which has been placed before you, but also to attempt, so far as possible, to reconcile the conflicting testimony upon questions of value and damages. If you shall find that there is a wide diversity in the testimony of different witnesses as to the value of defendants' property, and as to the damages occasioned to the defendants by reason of its taking, in attempting to reconcile the conflicting opinions of the different witnesses you should carefully consider the different theories upon which such opinions are based.

Determine on the one hand if witnesses have unduly diminished values, or the elements of value or injury which enter into their estimates, or whether they may have omitted altogether elements

of value or of injury which in fact exist, and should be considered.—

Determine on the other hand if witnesses have exaggerated the values which they have placed on the land, or any part of it; or have exaggerated the elements of injury which have entered into their estimates of depreciated value, or whether they have included estimates of injury which do not exist, or which should not have been considered.

Determine if the theory upon which the witnesses on either side proceeded in reaching their conclusions were sound or fallacious. Apply these and similar tests in order that you may be able, if possible, to reconcile the conflicting testimony and to give it all due weight, and to arrive at a just verdict. [754]

When you retire to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdicts for you when they have been agreed upon. Whereupon you will return into Court with the same and he will represent you as your spokesman in the further conduct of this case in this Court.

Your verdict in each instance must be unanimous.

The Clerk will hand you the form of verdicts, whereupon you will retire to the jury room to deliberate upon your verdict.

Any exceptions, gentlemen?

Mr. Goldstein: If your Honor please, in behalf of all of the defendants, in consistency with the theory of our case as it has been propounded here in the last two weeks, may I respectfully and in

due deference to your Honor's fair instructions throughout, considering the instructions as a whole, but purely on legal grounds, reserve and now except to the following instructions as given by the Court and contained in the instructions as a whole under the law: Plaintiff's Instructions No. 3, 4-a, 13, 13-a, and 18, and further we respectfully reserve an exception to the omission—not giving instructions requested by the defendants—all the defendants here—Instructions 9, 16, 20, and 22.

The Court: The exception will be noted.

Mr. Landrum: If your Honor please, the plaintiff respectfully excepts to the giving of Defendant Agnew's requested Instruction No. 1, Defendant Agnew's requested Instruction No. 2; Defendant Kinsella's requested Instructions Nos. 1, 2, 3, 4, and 5, and to the general requested instructions of all the defendants Nos. 21, 24 and 26, and the plaintiff respectfully excepts to the Court's failure to give Plaintiff's requested Instructions Nos. 5, 8, 9, 19 and 24.

The Court: The exceptions will be noted. [755]

[Endorsed]: No. 9680. United States Circuit Court of Appeals for the Ninth Circuit. Victor N. Miller, also known as Vic Miller, John J. Humphrey, also known as John J. Humphrey, Sr., also known as J. M. Humphrey, Charles J. McConnell, also known as Chas. J. McConnell, Elmer Johnson and Hilma Johnson, his wife, David Wilson Agnew, Albert Rouge and Florence Van Santen, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District

Court of the United States for the Northern District of California, Northern Division.

Filed November 12, 1940.

PAUL P. O'BRIEN,

**Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.**

**United States Circuit Court of Appeals
for the Ninth Circuit**

No. 9680

VICTOR N. MILLER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF.**

(Rule 19)

Come now the appellants on the above entitled appeal and present their statement of points on appeal, and designate the portions of the record they consider necessary for the consideration thereof, to wit:

I.

(a) The court erred in excluding the evidence offered by the defendants and appellants to show the fair market value on the 14th day of December, 1938 of their respective parcels of land taken by

plaintiff and the severance damages suffered by them, respectively, from such taking, as of the 14th day of December, 1938.

(b) The court erred in its rulings excluding from defendants' evidence of values and damages, and from the consideration of the jury, any increase or increment in the value of the respective parcels of land of said defendants and appellants affected by said proceeding in eminent domain, from and after the 26th day of August, 1937 and up to the 14th day of December, 1938, due to the Central Valley Project.

(c) The court erred in requiring the defendants and appellants, in presenting their evidence of damages resulting from said taking to exclude from consideration any increase or increment in the valuation of their lands from and after the 26th day of August, 1937, due to the Central Valley Project.

Appellants designate the following portions of the record as necessary for the consideration of said point:

1. Amended Complaint, omitting and excluding the following parts and portions thereof, viz:

(a) Omit from title of cause the names of all defendants except "Certain Parcels of Land", i.e. from line 22, p. 1-c to bottom of p. 3-c;

(b) Omit from line 13, p. 7-c to line 23, p. 9-c;

(c) Omit from line 8, p. 12-c to line 17, p. 16-c;

(d) Omit from line 10, p. 18-c to line 29, p. 19-c;

(e) Omit from line 27, p. 24-c to line 13, p. 27-c;

(f) Omit from line 6, p. 28-c to line 32, p. 30-c;

2. Declaration of Taking, omitting and excluding the following parts and portions thereof, viz:

(a) Omit all of page 31 (Cl. Tr.) except title "United States v. Certain Parcels of Land", etc.;

(b) Omit all of pages 32 and 33 (Cl. Tr.);

(c) Omit from line 3 to line 32, page 35;

(d) Omit page 36;

(e) Omit from page 37, lines 1 to 15;

(f) Omit from page 38, lines 23 to 32;

(g) Omit page 39;

(h) Omit page 40;

(i) Omit from page 41, lines 29 to 32;

(j) Omit from page 42, lines 1 to 29.

3. Judgment on Declaration of Taking, omitting and excluding the following parts and portions thereof, and inserting therein, as follows:

(a) Omit all of page 46, except "United States v. Certain Parcels of Land, etc. Judgment on Declaration of Taking";

(b) Omit page 47;

(c) Omit page 48;

(d) After copying pages 49 and 50, add after the word "follows" in line 32 of page 50 the following:

"Here follows a description of the parcels of land described in the amended complaint."

(e) Omit pages 51 to 58 inclusive, and page 59, lines 1 to 25.

4. Answers of Appellants, omitting and excluding therefrom as follows:

(a) From page 61, omit title, and commence with the words "Answer of Defendants Victor N. Miller", et al;

(b) Omit page 65;

(c) Omit page 66, lines 1 to 24;

(d) Omit from page 69, lines 10 to 24;

(e) Omit page 70;

(f) Omit from page 71, lines 1 to 18;

(g) Omit from page 77, lines 21 to 32;

(h) Omit page 78;

(i) Omit from page 79, lines 1 to 24;

(j) Omit from page 85, lines 19 to 32;

(k) Omit page 86;

(l) Omit from page 87, lines 1 to 18;

(m) Omit pages 92 and 93;

(n) Omit from page 94 down to words "Answer of Defendant Florence Van Santen";

(o) Omit page 97.

5. Verdict of the Jury.

6. Judgment, omitting and excluding therefrom the following portions thereof:

(a) Omit all of page 163 except title "United States v. Certain Parcels of Land" and word "Judgment";

(b) Omit page 164;

(c) Omit from page 166, commencing with line 27, and insert "Here follows description of land embraced in Parcel One";

- (d) Omit from page 167, lines 1 to 28;
- (e) Omit from page 168, lines 4 to 32, and insert "Here follows description of land embraced in Parcel Four";
- (f) Omit from page 169, lines 1 to 3;
- (g) Omit from page 169, lines 9 to 32;
- (h) Omit from page 170, lines 1 to 12;
- (i) Omit from page 170, lines 19 to 32, and insert "Here follows description of land embraced in Parcel Six";
- (j) Omit from page 171, lines 1 to 6;
- (k) Omit from page 171, lines 19 to 32, and insert "Here follows description of land embraced in Parcel Seven";
- (l) Omit page 172;
- (m) Omit from page 173, lines 1 to 7;
- (n) Omit from page 176, lines 12 to 32, and insert "Here follows verdict as rendered";
- (o) Omit pages 184, 184½, 185 and 186.

7. Testimony of Witnesses, as follows:

Mellin, Gilbert F.

Rep. Trans. Page 18 to page 31, line 8

Rep. Trans. Page 35, line 2 to page 53, line 10

Pearl, George L.

Rep. Trans. Page 56 to 59 inclusive

Rep. Trans. Page 64 to line 27, page 68

Rep. Trans. Page 69, line 16 to page 70,
line 6

Rep. Trans. Page 72, lines 9 to 18

Rep. Trans. Page 79, line 2 to page 82,
line 11

Rep. Trans. Page 83, lines 15 to 28

Rep. Trans. Page 84, lines 20 to 30

Rep. Trans. Page 85, lines 13 to 22

Rep. Trans. Page 87, line 2 to page 93, line 4

Rep. Trans. Page 104, line 4 to page 105,
line 8

Rep. Trans. Page 106, line 25 to page 109,
line 29

Rep. Trans. Page 110, line 13 to page 112,
line 25

Rep. Trans. Page 113, lines 2 to 12

Rep. Trans. Page 115, lines 9 to 23

Humphrey, John J.

Rep. Trans. Page 116 to page 142, line 26

Rep. Trans. Page 158, line 30 to page 163,
line 13

Rep. Trans. Page 165, line 4 to page 168,
line 25

Miller, Victor N.

Rep. Trans. Page 169 to 179

Kronschabel, Leland R.

Rep. Trans. Page 179, line 19 to page 182,
line 21

Rep. Trans. Page 187, line 21 to page 188,
line 20

Rep. Trans. Page 192, line 2 to page 194,
line 6

Rep. Trans. Page 194, line 19 to page 196,
line 7

Rep. Trans. Page 198, line 9 to page 199,
line 4

O'Connor, Francis

Rep. Trans. Pages 204 to 209, line 4

Rep. Trans. Page 292, line 19 to page 293,
line 6

Rep. Trans. Pages 284 to 289, line 26

Tibbetts, Jonathan

(See page 208)

Rouge, Albert

Rep. Trans. Page 209 to 213, line 17

Rep. Trans. Page 213, line 18 to page 218,
line 20

Rep. Trans. Page 223, line 11 to page 224,
line 24

Rep. Trans. Page 228, line 15 to page 229,
line 17

Johnson, Elmer

Rep. Trans. Page 235, line 13 to page 236,
line 10

Rep. Trans. Page 236, line 23 to page 239,
line 7

Rep. Trans. Page 239, line 13 to line 18

Rep. Trans. Page 239, line 23 to page 240,
line 6

Rep. Trans. Page 240, line 11 to line 19

Rep. Trans. Page 241, line 5 to line 21

Rep. Trans. Page 242, lines 26 to 30

Rep. Trans. Page 243, lines 23 to 30

Rep. Trans. Page 244, lines 6 to 28

Van Santen, Florence Mrs.

Rep. Trans. Page 246, line 23 to page 247,
line 10

Rep. Trans. Page 248, line 27 to page 250,
line 6

Agnew, David Wilson

Rep. Trans. Pages 263 to 277, line 21

Rep. Trans. Page 280, line 26 to page 281,
line 6

Rep. Trans. Page 281, line 17 to page 282;
line 11

Rep. Trans. Page 282, line 24 to page 283,
line 17

Glaha, Bernard G.

Rep. Trans. Page 297; line 20 to page 298,
line 5

Rep. Trans. Page 307, line 22 to page 308,
line 6

Mellin, Gilbert

Rep. Trans. Page 310, line 14 to page 311,
line 19

Rep. Trans. Page 312, line 28 to page 313,
line 17

8. Exhibits:

Plaintiffs Exhibits 1, 2, 3, 4, 6, 9 and 10

Defendants Exhibits A, B, C, D, E, F, and G

Defendants "D" for identification and "G"
for identification

(Original Exhibits to be used on considera-
tion of this appeal without reproduction in
record.)

II.

(a) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, Thomas G. Mapel, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project from the 26th day of August, 1937.

(b) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, F. C. Herrmann, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project from the 26th day of August, 1937.

(c) The court erred to the prejudice of defendants and appellants in admitting the testimony of the witness, Thomas G. Mapel, and the witness, F. C. Herrmann, as expert witnesses for the plaintiff, as to values of the properties of defendants and the damages suffered by them, when it affirmatively appeared that they did not and could not qualify as expert witnesses, nor as witnesses as to any facts pertaining to values and damages in said action.

(d) The court erred in admitting into evidence

any of the testimony of the witnesses, Thomas G. Mapel and F. C. Herrmann, in respect to the values of the respective parcels of land of defendants and appellants taken by plaintiff, or the damages suffered by them.

Appellants designate the following portions of the record as necessary for the consideration of said points:

Testimony of Witnesses:

Mapel, Thomas G.

Rep. Trans. Page 336 to page 341, line 23

Rep. Trans. Page 344, line 11, to page 354,
line 6

Rep. Trans. Page 356, line 18 to page 363,
line 18

Rep. Trans. Page 381, line 12 to page 385,
line 24

Rep. Trans. Page 384, line 25 to page 385,
line 11

Rep. Trans. Page 389, line 5 to Page 390

Rep. Trans. Page 396, line 4 to line 22

Rep. Trans. Page 396, line 22 to page 397,
line 7

Rep. Trans. Page 406, line 14 to line 28

Rep. Trans. Page 408, line 14 to line 27

Rep. Trans. Page 408, line 28 to page 410,
line 10

Rep. Trans. Page 435, line 9 to page 437,
line 1

Hermann, F. C.

Rep. Trans. Page 456, line 1 to page 463,
line 17

Rep. Trans. Page 463, line 21 to page 464,
line 7

Rep. Trans. Page 464, line 8 to page 464,
line 19

Rep. Trans. Page 464, line 22 to line 30

Rep. Trans. Page 465, line 1 to 14

Rep. Trans. Page 467, line 10 to line 30

Rep. Trans. Page 469, line 3 to line 6

Rep. Trans. Page 469, line 7 to page 470,
line 26

Rep. Trans. Page 476, line 16 to page 477,
line 15.

Rep. Trans. Page 486, line 8 to page 489,
line 26

Appellants also incorporate herein, by reference, the Amended Complaint and other pleadings, files and records of the District Court designated under Point Number 1, above set forth.

III.

(a) The court erred in its charge to the jury by giving the following instructions proposed by the plaintiff viz: Plaintiff's Instructions No. 3, 4-a, 13, 13-a, and 18, to which defendants and appellants duly excepted.

(b) The court erred in its charge to the jury by failing and refusing to give the following instructions requested by defendants and appellants viz: instructions 9, 16, 20, and 22.

defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey severally for the sum of \$650.00.

(b) Said judgment of the court awarding judgment in favor of the plaintiff and against the defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey, severally, for the sum of \$650.00 is against law.

(c) The court was without jurisdiction to award the plaintiff judgment against the defendants Charles J. McConnell, Victor N. Miller and John J. Humphrey, for the recovery from each of said defendants of the sum of \$650.00, or any sum, or at all.

As necessary for the consideration of said points on appeal the appellants designate the Amended Complaint and the Judgment of the Court as hereinabove designated and set forth under Point I, and same are incorporated herein by reference.

VI.

(a) The evidence was insufficient to justify the verdict rendered by the jury in respect to the respective parcels of land of the defendants and appellants taken by plaintiff, and the damages awarded for such taking; and said verdict is against law.

(b) The compensation and damages awarded to defendants and appellants, respectively, by the verdict and judgment herein is inadequate and unjust, and said verdict appears to have been given under the influence of passion and prejudice.

As necessary for the consideration of said points on appeal the appellants designate all those portions of the record hereinabove set forth under Points I, II and III, which are incorporated herein by reference.

Appellants also designate the following portions of the record:

From Transcript certified by Clerk of District Court:

- (a) Page 206, lines 21 to bottom of page;
- (b) Copy page 207;
- (c) Omit pages 208 and 209;
- (d) Omit page 210, lines 1 to 24;
- (e) Copy page 210, line 25 to bottom of page;
- (f) Copy pages 211, 212, 213, 214, 215;
- (g) Omit page 216;
- (h) Copy pages 217 and 218;
- (i) Omit from page 219, lines 1 to 24;
- (j) Copy page 219, line 25, pages 220-222;
- (k) Omit page 223;
- (l) Copy pages 224 and 225;
- (m) Omit page 226.

VII.

The court erred in denying the motions of the defendants and appellants, and each of them, for a new trial.

Appellants designate the following portions of the record as necessary for the consideration of said point:

1. Motions of appellants for a new trial, viz:
 - (a) Commencing on page 199 (Cl. Trans.), omit lines 1 to 22 (title of court and cause) and copy from line 24 to bottom of page;
 - (b) Copy page 200;
 - (c) Omit pages 201, 202, 203, and 204;
 - (d) Insert the following: "Similar motions were made by the defendants David Wilson Agnew, Elmer Johnson et ux, Albert Rouge, Leland R. Kronschnabel et ux, and Florence Van Santen.

2. Also all those portions of the record hereinabove designated under Points I, II and III, which are incorporated herein by reference.

VIII.

The court erred in granting in part only the motion of defendants Miller and Humphrey and the motion of defendant Charles J. McConnell to modify, amend and/or correct the judgment entered in said action, and otherwise denying said motions.

Appellants designate the following portions of the record as necessary for the consideration of said point:

1. Judgment, as hereinabove set forth under Point I;
2. Motions to modify, amend and/or correct the judgment, viz:
 - (a) Copy from page 187, (Cl. Trans.) omitting title of court and cause and commencing with words "Motion to modify, etc.";
 - (b) Copy pages 188 and 189;

- (c) Omit page 190;
- (d) Omit from page 191, lines 28 to 32, and insert "Here follows motion in same form as Motion of Defendant Charles J. McConnell as set forth above";
- (e) Omit pages 192, 193, 194 and 195;
- (f) Copy page 196;
- (g) Omit pages 197 and 198.

3. Application of defendants Charles J. McConnell, et al to obtain portion of money deposited in Court with respect to parcel No. 7.

4. Order of Court granting said application.

5. Receipt showing payment pursuant to above order.

The foregoing statement of points on appeal, and designation of the parts of the record which appellants deem to be necessary for the consideration of said appeal is respectfully presented and filed in compliance with Rule 19, Sub. 6 of the Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit.

J. OSCAR GOLDSTEIN,

Attorney for Appellants

Victor N. Miller, et al.

CARR & KENNEDY,

Attorneys for Appellants

Charles J. McConnell, et al.

R. P. STIMMEL,

Attorney for Appellants

Albert Rouge, et al.

[Endorsed]: Filed Dec. 20, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**APPELLEE'S COUNTER DESIGNATION OF
ADDITIONAL PARTS OF THE RECORD
FOR PRINTING.**

The above named appellee hereby designates for printing the following additional parts of the Transcript of Record filed herein, the same being necessary and material for the consideration of the points relied on in this appeal:

1. Notice of appeal of Victor N. Miller, et al., pages 206-207;
2. Cost bond on appeal, pages 208-209;
3. Appellants' statement of points on appeal, filed in the United States District Court, pages 210-215;
4. Appellants' designation of contents of record on appeal, filed in the United States District Court, pages 219-223;
5. Appellee's counter designation of the contents of the record on appeal, filed in the United States District Court, pages 224-226;
6. Appellants' statement of points on appeal and designation of parts of record necessary for the consideration thereof, filed December 20, 1940;
7. All original exhibits transmitted to the United States Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Northern District of California, Northern Division, pursuant to order of said District Court made and entered November 9, 1940.

If appellants move this Honorable Court for its order to grant permission to dispense with the printing or reproducing of said exhibits, or portions thereof, (counsel for appellee has been advised that appellants will so move) said motion and the order thereon, if granted, are hereby designated for printing; said original exhibits being more particularly described as follows:

Plaintiff's Exhibits 1, 2, 3, 4, 6, 9 and 10;

Defendant's Exhibits A, B, C, D, E, F and G;

Defendants' Exhibits D and G for Identification.

8. Appellee's counter designation of additional parts of the record for printing, filed January 14, 1941;

9. Order extending time for appellants to file statement of points and designation of record, and to pay printing deposit, made and entered November 25, 1940;

10. Order extending time of appellee to file designation of additional portions of transcript to be printed, made and entered December 28, 1940.

Respectfully presented and filed in compliance with Rule 19, Subdivision 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, January 14, 1941.

FRANK J. HENNESSY,
United States Attorney,
R. B. McMILLAN,
Assistant United States At-
torney,
Attorneys for Appellee.

[Endorsed]: Filed Jan. 14, 1941. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**ORDER DISPENSING WITH PRINTING
OF ORIGINAL EXHIBITS.**

Upon consideration of the motion of appellants, and stipulation of counsel for respective parties thereon, that the original exhibits in above cause not be printed as part of the printed transcript of record but may be considered by this Court in their original form, and good cause therefor appearing, It Is Ordered that said application be, and hereby is granted, and that the original exhibits in this cause need not be printed as a part of the printed transcript, but may be considered in their original form.

FRANCIS A. GARRECHT

United States Circuit Judge

Dated: San Francisco, Calif., January 18, 1941.

[Endorsed]: Filed Jan. 20, 1941. Paul P.
O'Brien, Clerk.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt From Proceedings of Friday, October 24, 1941

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges

Order of submission

Ordered appeal here argued by Mr. J. Oscar Goldstein, counsel for appellants Miller et al., and Mr. R. P. Stimmel, counsel for appellants Rouge et al., and by Mr. Laurence J. Kennedy, counsel for appellants McConnell et al., and by Mr. Joseph F. Cotter, Attorney, Department of Justice, counsel for appellee, and submitted to the court for consideration and decision.

Order directing filing of opinion and dissenting opinion, and filing and recording of judgment

By direction of the Court, ordered that the typewritten and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

In The United States Circuit Court of Appeals for the
Ninth Circuit

No. 9680—Jan. 22, 1942

VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER, JOHN J. HUMPHREY, ALSO KNOWN AS JOHN J. HUMPHREY, SR., ALSO KNOWN AS J. M. HUMPHREY, CHARLES J. MCCONNELL, ALSO KNOWN AS CHAS. J. MCCONNELL, ELMER JOHNSON AND HILMA JOHNSON, HIS WIFE, DAVID WILSON AGNEW, ALBERT ROUGE AND FLORENCE VAN SANTEN, APPELLANTS,

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division

Before GARRECHT, HANEY, and STEPHENS, Circuit Judges.

STEPHENS, Circuit Judge.

The United States Government, through its Secretary of the Interior, seeks by action in eminent domain to acquire several

parcels of land for the relocation of the main line of the Central Pacific Railway Company between Redding and Delta, in Shasta County, California. Such relocation of the railway is made necessary through the construction of the Shasta Dam, a feature of the so-called Central Valley Project.

The several Acts of Congress relative to the project as cited and epitomized in the margin¹ are intended as a part of the statement of fact upon which this opinion is based.

The record does not disclose the date of filing the original complaint herein, but the amended complaint was filed December 14, 1938. On the same day a declaration of taking in accordance with the Act of Congress (40 U. S. C. A. 258a) was filed, and a judgment upon said declaration of taking was made and entered in the District Court.

Following the filing of the declaration of taking and the entry of the judgment based thereon, the Government took possession of the properties in question; Issues as to the value of the lands taken and the damages suffered by reason of the taking were the subjects of trial in the District Court January 29, 1940.

¹Act approved June 17, 1902, 32 Stat. 388, which established a "reclamation fund" for the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in certain states, including California.

Act approved April 8, 1935, 49 Stat. 115, which appropriated certain sums for relief purposes, including, inter alia, "water conservation, trans-mountain water diversion and irrigation and reclamation."

Act approved August 30, 1935, 49 Stat. 1028, authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and other purposes. By this Act it was enacted "that the following works of improvements on rivers, harbors, . . . are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War . . . in accordance with the plans recommended in the respective reports hereinafter designated, and subject to the conditions set forth in such documents . . . Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress."

Act approved June 22, 1936, 49 Stat. 1622, which was a general appropriation bill, appropriating funds for the Central Valley Project, California, together with other projects.

Act approved August 26, 1937, 50 Stat. 844, authorizing the construction, repair, and preservation of certain public works on rivers and harbors. Section 2 of this Act provided "that the \$12,000,000 recommended for expenditure for a part of the Central Valley Project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered Thirty-five, Seventy-third Congress, and adopted and authorized by the provisions of the Act of August 30, 1935, 49 Stat. 1028, at 1935, entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War; Provided, that the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law; Provided, further, that the entire Central Valley Project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purpose of improving navigation, regulating the flow of the San Joaquin and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of the arid and semiarid lands and lands of Indian Reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings."

Act approved May 9, 1938, 52 Stat. 291, 324, which appropriated funds for, inter alia, "continuation of construction of the following projects and for general investigation . . . Central Valley project, California, \$9,000,000.00, together with the unexpended balance of the appropriation for this project contained in the . . . appropriation act . . . with authority in connection with the construction of the Central Valley project, California: (1) to purchase or condemn and to improve suitable land for relocation of highways, roadways, railroads, telegraph, telephone, or electrical transmission lines or other properties the relocation of which in the judgment of the Secretary of the Interior will be necessitated by construction or operation and maintenance of said project."

By its judgment the District Court, in addition to awarding judgment for compensation for the lands taken in accordance with the verdict of the jury, went outside the issues tried and summarily gave judgment in favor of the Government against three of the landowners for \$650.00, this being the sum deposited in Court over and above the jury awards.

Certain of the defendants in the action, including those against whom the \$650.00 judgment to the Government was awarded, appeal, claiming that prejudicial error occurred during the trial and that the Court was without jurisdiction to decree the judgment of \$650.00. That the Court was without the jurisdiction to enter such judgment is so obvious that we so hold without further discussion and shall not herein refer to that subject again except to designate the scope of our decision.

The other claimed errors relate to the rulings on evidence and instructions to the jury, and they arise from the Court's holding that the fair market value of the lands taken on December 14, 1938 (date of the judgment on the declaration of taking), was to be established without taking into consideration any increase in value which occurred after the passage of the Central Valley project authorization Act of August 26, 1937. There is no point made that increase in value occurred from any special cause. It is apparent from the objections made, the argument upon the objections and the Court's remarks and instructions to the jury, that all parties had in mind only such increase in value as occurred merely because of the passage of the Act.

This question arose at the trial in several different manners. Appellants sought to give evidence as to sales of other lands in the neighborhood made after the passage of the Act or after August 26, 1937, and this evidence was excluded. They endeavored to prove the fair market value of their lands on the date of the taking without excluding any increase in value subsequent to the passage of the Act; and they objected to the Government's witnesses so qualifying their testimony. It must be borne in mind at all times that none of the lands, the subject of this action, were lands contemplated for use by the Government in the terms of the Act.

The district judge consistently ruled that the appellants were not entitled to any such increase in value and so instructed the jury.

The following excerpts from the record will serve to illustrate:

"Q. (To John J. Humphrey, Sr., one of the appellants herein). Are you part owner of what has been described here as the Rouge tract * * *?"

"A. Yes, sir.

"Q. Were you the owner of an undivided one-third interest in that property on December 14, 1938, and prior thereto?

"A. Yes, sir.

"Q. Some time prior thereto?

"A. Yes, sir.

"Q. Now, then, did you yourself make sales of parcels of real estate—answer this yes or no—in that vicinity?

"A. Yes, sir.

"Mr. LANDRUM (Attorney for the Government). That is objected to on the ground and for the reason it is indefinite as to time.

"The COURT. Fix the time.

"Q. Prior to December 14, 1938.

"Mr. LANDRUM. That is objected to upon the ground and for the reason it is incompetent, irrelevant, and immaterial, and includes a time subsequent to the Act of Congress. It is our position, your Honor, and in order that it may be perfectly plain for the record, this case is controlled by the Shoemaker case; a decision of the Supreme Court of the United States, wherein the Supreme Court held that they could not show sales of land in the vicinity made subsequent to the Act of Congress creating Rock Creek Park, and it is our position their sales must be prior to the time of the Act of Congress establishing this project. * * *

"The COURT. The objection is sustained.

"Q. Mr. Humphrey, directing your attention to the tract referred to as Parcel No. 1, the Rouge tract, which I asked you about prior to the time that the matter came up before the Court, you say that you were one of the owners of that tract of land on December 14, 1938?

"A. Yes, sir.

"Q. I will ask you to state what was the fair market value of that particular piece of land or that tract of land on December 14, 1938?

"Mr. LANDRUM. Just a moment, that is objected to on the ground and for the reason it is incompetent, irrelevant, and immaterial, no foundation laid, on the further ground and further reason that it includes within itself any increased value in this property due to the Central Valley project.

"Mr. GOLDSTEIN (Attorney for the appellants). If the Court please, I am going to answer Counsel's objection twofold: First of all, his objection with relation to foundation. Your Honor is entirely familiar with the law of California that an owner can testify as to the value of his own property, whether real or per-

sonal, and no foundation need be laid. The second ground of objection, with reference to the matter of the inclusion of any values claimed by Counsel is a matter of cross-examination and not upon the preliminary question of market value of the property.

"Mr. LANDRUM. Your Honor, that is precisely the same thing, that is precisely covered by the very question which your Honor sustained my objection to. My objection to this question—and it is important—goes to its form, in that it doesn't eliminate from the answer any increased value over the value of the property due to the Central Valley project. If he will ask the value, forgetting—excluding any increase in the value due to the project—I will have no objection, but his question is going right back to the very thing the Supreme Court in the Shoemaker case says he can't do."

* * *

"The Court. I rule that the objection is sustained."

Similar rulings were made upon objections to testimony of expert witnesses attempting to testify as to the value of the property as of the date of the taking.

To put it simply, the Court ruled that no evidence could come in as to sales of similar properties after August 26, 1937, and that qualified witnesses testifying as to the value of the land on the date of the taking must subtract from this valuation any increment in value after August 26, 1937.

ADMISSIBILITY OF EVIDENCE OF OTHER SALES

The case of *Shoemaker v. United States*, 147 U. S. 282, 37 L. Ed. 170, is relied upon by the Government in support of its position that the trial court's rulings were correct.

In the cited case the condemnation proceedings were instituted under the authority of an Act of Congress approved September 27, 1890, 26 Stat. 494, "authorizing the establishing of a public park in the District of Columbia" and directing that a tract of land lying on both sides of Rock Creek, and within certain limits named in the Act be secured as thereafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States.

The Supreme Court approved of two instructions reading,

"The commissioners are instructed that they shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th day of September 1890, authorizing said park, but

any recent bona fide sales made before the passage of said Act, of lots similarly situated and adapted to similar uses, or recent bona fide contracts made before the passage of said Act, with land owners, for other lands in the vicinity similarly situated, may be considered by the commissioners, looking at all the circumstances of these sales or contracts in the determination of the ultimate question of value."

and

"The commissioners are further instructed that they shall be governed in their inquiry in making their valuations by the following considerations: What are the lands within the park limits now worth in cash, or in terms equivalent to cash, in the market, if a market now exists for such lands! . . . They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes, nor can they consider the value given them by the establishing the park, and they are to make their valuation without consideration of the fact that a specific amount of money is appropriated by the Act of Congress of 27th September 1890."

In answer to the property owners' contention that these instructions were improper, the Court said (p. 305):

"While the board should be allowed a wide field in which to extend their investigation, yet it has never been held that they can go outside of the immediate duty before them, viz, to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had. *Kerr v. South Park Commissioners*, 117 U. S. 379, 380."

An analysis of the *Kerr* case cited by the Supreme Court clearly indicates the bases upon which the instruction objected to was upheld. There, too, the condemnation was for the purpose of a public park. We quote (p. 384):

"On the trial of the issue before the jury as to the value of the land in question taken by the appellees for the purposes of the park, the appellants offered to prove, as tending to show the value of their land, the prices which had been actually paid on sales of similar property situated so as to adjoin the park, or be within its immediate vicinity, *sales which had taken place after the lines of the park boundaries had been definitely ascertained and laid out*. This evidence was rejected, and this ruling, together with the charge of the court to the jury on the point, are assigned as error to the prejudice of the appellants.

"The portions of the charge of the court to the jury objected to on that ground are as follows:

"A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature, which finally became the law on the — day of February 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. *Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity of the city of Chicago, you should take in account in determining the amount that fairly compensate the owner.* But a number of witnesses also testified, and there seemed to be less agreement upon this point than upon some others, that the passage of the park act, its ratification by the people, and the fixing of the proposed park boundaries by the legislature, gave to the lands immediately fronting upon and in the vicinity of the park, including the Midway Plaisance and the boulevards, an additional value solely on account of their being without the proposed park lines, but adjacent to the park, the plaisance, and the boulevards, or near enough thereto to receive the special benefits resulting from such improvements. *In the nature of things the lands within the proposed park, and which were to constitute it, could not have been thus specially benefited,* and the owner of the lands in question should be allowed nothing on the ground that his property was thus specially benefited.

"Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to in determining the value of lands; *but inasmuch as the lands adjacent to and in the vicinity of the park, plaisance, and boulevards received a special benefit, and were subject to a special burden by reason of the existence of the park, plaisance and boulevards, their situation and that of lands embraced within the park lines were relatively so different that outside sales afforded no just grounds for determining the character of the lands taken for the park, and hence all evidence of such sales was excluded, and you are again instructed that there is no such evidence before you.*

"We think the evidence offered was properly excluded, and that the true rule for the valuation of the property was correctly and fairly stated in the charge of the court above quoted," [Italics supplied.]

It should be noted that the Court held that it was proper to take into consideration the enhancement in value of the property by reason of the anticipation that the legislature would authorize the appropriation of the lands to establish the park. These lands were more or less available and their value was subject to the play of events affecting such availability. Once the park lines were fixed the value of the lands to be taken could not by any reason be measured in any degree by the value of neighboring property after the value thereof has been influenced by the certainty of the improvement. Evidence of sales of these lands was excluded because they were no longer "similar lands" and no longer afforded any criterion for determining the character of the lands taken for the park.

Let us compare the Shoemaker and the instant cases. As we have said, the Act of August 26, 1937, reauthorized the entire Central Valley project. But there was no selection of the right of way for the railroad relocation until the complaint in this action was filed on December 14, 1938. It is true that the record shows that a survey had been made as early as 1936, but it also appears that there were more than one proposed route for the railway line. So far as the record before us shows, there was no certainty as to its location until the date of the taking.

In this circumstance, the Shoemaker case does not support the Government's contention. The Government's deductions from the facts of that case that there was no certainty as to the boundaries of the park do not logically follow. The Act did establish the location of the park, and it is apparent from the language of the Supreme Court that it based its decision on the theory that the lands falling certainly outside the park were not "similar lands" to the lands condemned.

TIME OF FIXING VALUES

The Government's view that values of real properties which may possibly be taken by the Government are frozen at the values existing at the time of determining upon the construction of a public improvement is illogical and wholly unsupported by authority, and most certainly it is not supported by the Shoemaker case. The decisions are uniform in holding that the value at the time of the taking is the measure of compensation to which the land owner is entitled when property is taken by the Federal Government in eminent domain proceedings. United States v.

Chandler-Dunbar Co., 229 U. S. 53; *United States v. Rogers*, 255 U. S. 163; *Olson v. United States*, 292 U. S. 246; *Danforth v. United States*, 308 U. S. 271.

In the *Danforth* case, *supra*, the petitioner alleged that the passage of the authorizing Act diminished immediately the value of his property because the plan contemplated the ultimate use thereof as a floodway. It was the petitioner's contention that because of this alleged fact the actual date of taking was the date of the passage of the Act. The Supreme Court held otherwise, and in the course of its decision had the following to say which is of interest in the instant case:

"The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified or appropriations may fail."

The rule contended for by the Government and which was followed by the trial judge in the instant case would lead to extremes of injustice and would be quite impracticable. Any governmental activity in connection with the improvement in any reasonable vicinity of the site of the improvement would give the Government the right to step in and condemn property at its market value as of a date immediately preceding announcement of the intended improvement, notwithstanding its legitimate rise in market value for ordinary commercial purposes. Long after commencement of the improvement the Government officials could make up their minds that an administration building should be erected upon a certain corner of a town established since the beginning of and because of the improvement. The instant owner may well have bought in the stimulated market intending to use the property for commercial purposes. Yet it could be taken from him at its value as of a time when its usefulness, if useful at all, was far inferior in character as values go.

Our holding that the owner is entitled to compensation equal to the market value of his property at the time of the taking is not inconsistent with the decisions of the Supreme Court in *United States v. Chandler-Dunbar Co.*, *supra*, and *Olson v. United States* (*supra*, wherein it was stated that the property should not be valued "as enhanced by the purpose for which it was taken." What the Court meant by this expression is indicated by its language in the *Olson* case (p. 256):

"But the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels

for public use is not the measure of or a guide to the compensation to which the owner is entitled."

In other words, the owners in the instant case should receive as compensation for the lands taken the full market value of those lands as of the date of the taking. In determining that market value, evidence of sales of similar properties should be considered, whether those sales occurred before or after the passage of the Act of August 26, 1937. If upon a new trial it should develop that at any time between August 26, 1937, and the date of the taking, the location of the new railway became fixed or a "practical certainty" (United States v. Certain Lands, Town of Narragansett, 180 Fed. 260, 261-262), then adjoining lands would no longer be "similar properties" and evidence of sales of such lands would furnish no criterion for the value of the property taken by the Government. This fact, however would not affect the right of the owners to prove by any other proper means the value of their properties at the date of the taking.

The decree is reversed as to the appellants, and the cause is remanded to the trial court for further proceedings consistent herewith.

GARRECHT, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority opinion wherein it holds that the judgment in favor of the Government against three of the land-owners for \$650, being the amount deposited in court over and above the jury's award, must be vacated. Los Angeles, etc., Ry. Co. v. Rumpp, 104 Cal. 20, 25. The District Court should be affirmed on all other points. The majority opinion labors to make out that the case of Shoemaker v. United States, 147 U. S. 282, relied upon by appellee does not sustain the Government's position. To avoid the force and effect of this case the main opinion asserts that the Act there involved definitely described the lands to be taken but that in the instant case the lands to be acquired were neither fixed nor defined.

The opinion in the Shoemaker case and the statute involved (26 Stat. 492, c. 1091) clearly shows that the lands intended to be taken were not definitely fixed other than that the selection of the site for Rock Creek Park should be made within a certain area as located therein by a commission of engineers and citizens. It is doubtful if the lands there to be taken were as definitely ascertainable as in this case.

1. It is not correct to say that the lands to be acquired for this Central Valley Project were unknown on August 26, 1937, when the Act was passed. Before that date the site of the Shasta Dam had been selected. Its construction involved relocation of the

line of the railroad, for which surveys had been made, and as early as March 1936, the proposed right-of-way was relocated and staked out on the lands here in question. Indeed, in September 1937, a surveyor employed by appellant made a map showing the lands here involved, and thereon he platted the relocated railroad line.

In like situations courts have generally held that the landowner is not entitled to claim an enhanced value attributable to the Government Project, and the case of *Kerr v. South Park Commissioners*, 117 U. S. 379, 384-387, cited in the main opinion is an authority in point. See also *Orgel, Valuation Under Eminent Domain*, pp. 328-352; *San Diego Land etc. Co. v. Neale*, 78 Cal. 63, 75. The majority opinion distinguishes the above case and the case of *Shoemaker v. United States*, supra, 147 U. S. 282, by indulging in refinements which find substance in placing undue emphasis on certain words while disregarding the purpose and effect of the decisions.

The rulings of the trial court and the instructions, repeated in various ways, held that appellant could not show or recover for any increased value of the property due to the Central Valley Project, that is, that any increase in the value of the property taken due to the Project after August 26, 1937, was to be excluded from the consideration of the jury. As the trial court remarked, "The Government must not be required to pay for something it has itself made."

In my opinion these rulings and instructions are supported by the authorities and by sound reasoning as well. If the Government were required to compensate landowners for increase in values directly attributable to the Government Project, and which occurred after the Project has been finally authorized, a serious burden would be placed on the public.

Just compensation means the award of an amount which will be "just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl v. School District*, 133 U. S. 553, 562. *Bauman v. Ross*, 167 U. S. 548, 574.

[Endorsed:] Opinion and Opinion Concurring in part and Dissenting in part. Filed Jan. 22, 1942. Paul P. O'Brien, Clerk.

Judgment

United States Circuit Court of Appeals for the Ninth Circuit

No. 9680

VICTOR N. MILLER, ETC., ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Northern Division.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this court.

[Endorsed:] Judgment. Filed and entered January 22, 1942.
Paul P. O'Brien, Clerk.

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred eighty one (481) pages, numbered from and including 1 to and including 481, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of January, 1942.

[SEAL]

PAUL P. O'BRIEN, Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed June 1, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED

APR 22 1942

CHARLES ELMORE COOLEY
CLERK

No. **1166** 78

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

**VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER;
JOHN J. HUMPHREY, ALSO KNOWN AS JOHN J.
HUMPHREY, SR., ALSO KNOWN AS J. M. HUMPH-
REY; CHARLES J. McCONNELL, ALSO KNOWN AS
CHAS. J. McCONNELL; ELMER JOHNSON AND
HILMA JOHNSON, HIS WIFE; DAVID WILSON
AGNEW; ALBERT ROUGE; AND FLORENCE VAN
SANTEN**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

INDEX

	Page
Opinion below.....	2
Jurisdiction.....	2
Questions presented.....	2
Statute involved.....	2
Statement.....	3
Reasons for granting the writ.....	6
Conclusion.....	14
Appendix.....	15

CITATIONS

Cases:

<i>Baltimore & O. R. Co. v. United States</i> , 279 U. S. 781.....	13
<i>Benton v. Brookline</i> , 151 Mass. 250.....	9
<i>Cariack v. County Highway Committee</i> , 216 Wis. 375.....	13
<i>Cherokee Nation v. Southern Kansas Ry. Co.</i> , 135 U. S. 641.....	11
<i>Dorgan v. Boston</i> , 94 Mass. 223.....	9
<i>Douglas v. Indianapolis Traction Co.</i> , 37 Ind. App. 332.....	13
<i>Egan v. City of Philadelphia</i> , 108 Pa. Super. Ct. 271.....	9
<i>Kentucky Hydro-Electric Co. v. Woodard</i> , 216 Ky. 618.....	13
<i>Kerr v. South Park Commissioners</i> , 117 U. S. 379.....	8, 9
<i>Los Angeles etc. Ry. Co. v. Rumpp</i> , 104 Cal. 20.....	11
<i>May v. Boston</i> , 158 Mass. 21.....	9
<i>Morgan v. United States</i> , 307 U. S. 183.....	12
<i>Mowry v. Boston</i> , 173 Mass. 425.....	9
<i>Northwestern Fuel Co. v. Brock</i> , 139 U. S. 216.....	13
<i>Olson v. United States</i> , 292 U. S. 246.....	10
<i>Pierce County ex rel. Bellingham v. Duffy</i> , 104 Wash. 426.....	9
<i>Railroad Co. v. Mai Adaras</i> , 257 Mo. 448.....	9
<i>St. Louis, K. & N. Ry. Co. v. Knapp-Stout & Co.</i> , 160 Mo. 396.....	13
<i>San Diego Land Co. v. Neale</i> , 78 Cal. 63.....	9
<i>Seaboard Air Line Ry. v. United States</i> , 275 Fed. 77.....	9
<i>Shoemaker v. United States</i> , 147 U. S. 282.....	6, 7, 8, 9
<i>Smith v. Commonwealth</i> , 210 Mass. 259.....	9
<i>United States v. Certain Lands, Town of Narragansett</i> , 180 Fed. 200.....	9
<i>United States v. Wurts</i> , 303 U. S. 414.....	12

II

Statutes:	Page
Act of September 27, 1890, c. 1001, 26 Stat. 492.....	6
Act of February 26, 1931, c. 307, 46 Stat. 1421-1422, 40 U. S. C. sec. 258a.....	11, 15
Act of August 30, 1935, c. 831, 49 Stat. 1028.....	3
Act of June 22, 1936, c. 653, 49 Stat. 1570.....	3
Act of August 26, 1937, c. 832, 50 Stat. 844.....	3
 Miscellaneous:	
2 Lewis, <i>Eminent Domain</i> , sec. 843, p. 1471, (3d ed. 1909)...	13
Orgel, <i>Valuation Under Eminent Domain</i> (1936), pp. 328-352.....	9
Rivers and Harbors Com. Doc. No. 35, 73d Cong., 2d sess., p. 5.....	3

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AGNEW; ALBERT ROUGE; AND FLORENCE VAN
SANTEN**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 22, 1942, reversing a judgment of the United States District Court for the Northern District of California in eminent domain proceedings.

OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 466-476) is reported in 125 F. (2d) 75.

JURISDICTION

The judgment of the circuit court of appeals was entered January 22, 1942 (R. 477). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether just compensation includes increases in the value of the lands taken, resulting wholly from reauthorization of the project for which they were taken.

2. In a proceeding under the Declaration of Taking Act the court ordered paid to the landowner the monies deposited by the United States as the estimated value of the land. May the United States have judgment for restitution upon a jury finding that the lands were worth a lesser amount?

STATUTE INVOLVED

Section 1 of the Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421-1422, 40 U. S. C. sec. 258a, is printed in the Appendix (pp. 15-17, *infra*).

STATEMENT

On December 2, 1935, upon the recommendation of the Secretary of the Interior, the President approved construction of the Central Valley Project, a comprehensive program for the conservation, regulation, and utilization of the water resources of the Sacramento and San Joaquin rivers (R. 2-3, 237-238, 240).¹ The key unit of the project is a dam and power plant on the Sacramento river. In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior reported (pp. 7-8) that Shasta had been selected as the site for this dam. The project was reauthorized by Congress in Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 844, 850.

Construction of the Shasta dam necessarily involved relocation of thirty miles of the line of the Central Pacific Railroad, for the reservoir would flood part of the existing right-of-way (R. 5-6,

¹ On April 6, 1934, prior to approval of the project by the President, the Chief of Engineers, United States Army, recommended that the Federal Government contribute \$12,000,000 toward construction of the dam on the Sacramento River. Rivers and Harbors Com. Doc. No. 35, 73d Cong., 2d Sess., p. 5. The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1038, authorized the expenditure of that amount. After the President's order approving the project the Act of June 22, 1936, c. 688, 49 Stat. 1570, 1622, appropriated \$6,900,000 for the Central Valley Project. Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 844, 850, reauthorizing the project, also provided that the \$12,000,000 should, when appropriated, be expended by the Secretary of the Interior rather than the Secretary of War.

157-158). As early as March 1936 the relocated right-of-way was marked on the lands belonging to respondents by stakes driven not more than 100 feet apart (R. 169, 175, 177, 184-185). An alternative route for the right-of-way was also staked out (R. 177, 179). In September 1937, at the request of respondents, one George L. Pearl subdivided their lands. His map showed the proposed railroad right-of-way (R. 224, 225, 226, 291, 292).

The amended complaint in eminent domain was filed on December 14, 1938 (R. 2-23). On the same day, pursuant to the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. secs. 258a-258e, a declaration of taking signed by the Acting Secretary of the Interior was filed, taking for relocation of the railroad right-of-way lands of respondents and certain other lands (R. 23-34). The declaration estimated \$2,550 as just compensation to be paid for the tract belonging to respondents Miller, Humphrey, and McConnell, and that sum was deposited in court (R. 33-34). Upon the application of Miller, Humphrey, and McConnell (R. 69-72), the court directed its clerk to pay each of them a third of the deposit, or \$850, on account of the just compensation which they were entitled to receive (R. 73-74).

At the trial respondents first sought to ask a witness whether he had made sales of real estate in the vicinity before December 14, 1938 (R. 231).

The testimony was excluded on the ground that evidence was inadmissible as to sales after August 26, 1937, when the Act reauthorizing the Central Valley Project was approved (R. 231-232). Thereafter, the witnesses were limited in their testimony as to the value of the land to the fair market value of the several tracts as of December 14, 1938, "leaving out of consideration any increase . . . in that value from and after August 26, 1937, due to the Central Valley Project." (R. 232-240, 248, 252, 274, 304, 317, 319, 339, 352, 367-369, 406-407.) By these rulings on evidence and in its charge (R. 428-429), the court excluded from consideration any increase in the value of the property resulting solely from passage of the Act of August 26, 1937.

The jury awarded respondents Miller, Humphrey, and McConnell \$500 for their land and \$100 severance damages (R. 112). Since the court had allowed them to withdraw the \$2,550 deposited with the declaration of taking, or \$1,950 more than just compensation, judgment was entered against each for \$650, the excess amount which each had received (R. 124-125).

On appeal, the circuit court of appeals reversed the judgment in an opinion holding (1) that the respondents were entitled to compensation for the value of their lands on the date of the taking, including the increase in value resulting from the project for which the lands were taken and after

its approval, and (2) that the district court erred in ordering restitution of the excess amounts which respondents Miller, Humphrey, and McConnell had been paid.

REASONS FOR GRANTING THE WRIT

1. In holding that the just compensation included any increase in the value of the lands resulting solely from the Central Valley project for which they were taken, the court below decided an important question of federal law in a way which probably conflicts with *Shoemaker v. United States*, 147 U. S. 282.

In the *Shoemaker* case the facts were these: The Act of September 27, 1890, c. 1001, 26 Stat. 492, authorized a commission to select not more than 2,000 acres within designated geographical limits as a site for Rock Creek Park. Six and a half months later the commissioners filed a map showing the lands selected. In the condemnation proceedings, certain landowners objected to two instructions given to the appraisers by the court. The first directed the appraisers to (147 U. S. at 303)—

receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September 1890 * * * * *

By the second instruction, the appraisers were told (147 U. S. at 304)—

They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes, *nor can they consider the value given them by establishing the park* * * * [Italics added.]

On review this Court approved both instructions, holding that appraisers are never allowed "to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had" (147 U. S. at 305).

In the instant case the district court followed that decision precisely. It excluded evidence of sales of similar property so situated as to benefit from the project, and made after the Act of Congress reauthorizing the project became law (R. 231). It required witnesses testifying as to the value of the lands on the date of the taking to exclude from their estimates any added value given to the lands by the project (R. 248, 252, 274, 304, 317, 319, 339, 352, 367-369, 406-407). In holding these rulings to be error, the court below failed to follow the *Shoemaker* case.

The court below attempted to distinguish the *Shoemaker* case on the ground that it decided only that lands outside the park were not sufficiently

"similar" to those within it for evidence of their selling prices to be admissible. This, the court said, was decisive, for in the present case the right-of-way was not finally located upon the lands taken until the date of the taking, whereas the lands in the *Shoemaker* case were within the limits of the park.

The factual distinction does not exist. As Judge Garrecht pointed out in his dissent (R. 475), the location of Rock Creek Park was not definitely fixed by the Act of Congress. The respondents here knew that in all probability their lands would be taken upon final authorization of the project, for a proposed right-of-way had been staked out over them.

Moreover, the distinction would make no difference. The opinion in the *Shoemaker* case squarely rejected the contention that the evidence of value might include "any supposed or speculative value given to the property taken by reason of the act of Congress creating the park project," and therefore did not decide only that lands outside the park were not "similar lands" (147 U. S. at 304-305). Neither does the citation of *Kerr v. South Park Commissioners*, 117 U. S. 379, in the *Shoemaker* case support the interpretation put upon the *Shoemaker* case by the court below. For while it is true that the *Kerr* case deals with evidence of sales of land outside of, but benefited by, a park which had been definitely located, this Court did not imply that if the location had not been definite the evidence would have been admis-

sible. Finally, we may point out that the definiteness of the site is immaterial to either of the two reasons upon which the rule of the *Shoemaker* case must rest. The first reason is that "the Government must not be required to pay for something it has itself made."² The second is that the lands taken can receive no benefit from the public work and hence do not in fact increase in value.³

The court below misconceived the Government's argument when it said that the Government sought to fix value as of the date of the Act rather than as of the time of the taking. In the district court the lands were evaluated as of the time of the taking both by the witnesses and by the jury in accordance with the charge; any rise in value between the two dates, such as a discovery of minerals, would have been taken into account if dissociated from the passage of the Act. The exclu-

² Dissenting opinion of Judge Garrecht, R. 476. See *Seaboard Air Line Ry. v. United States*, 275 Fed. 77, 82-83 (E. D. S. C.); *San Diego Land Co. v. Neale*, 78 Cal. 63, 74; *Railroad Co. v. MacAdaras*, 257 Mo. 448, 463-464 (1914); *May v. Boston*, 158 Mass. 21, 30.

³ See *Kerr v. South Park Commissioners*, 117 U. S. 379, 385; *May v. Boston*, 158 Mass. 21; *Benton v. Brookline*, 151 Mass. 250; *Dorgan v. Boston*, 94 Mass. 223; *Egan v. City of Philadelphia*, 108 Pa. Super. Ct. 271; *Mowry v. Boston*, 173 Mass. 425; *Pierce County ex rel. Bellingham v. Duffy*, 104 Wash. 426; *Smith v. Commonwealth*, 210 Mass. 259; *United States v. Certain Lands, Town of Narragansett*, 180 Fed. 260 (C. C. R. I.); *Orgel, Valuation under Eminent Domain* (1936), 328-352.

sion of improper elements of value does not violate the rule that value must be determined as of the time of the taking, for as this Court stated in *Olson v. United States*, 292 U. S. 246, 261:

Prices actually paid, and estimates or opinions based, upon the assumption that value to owners includes any such elements are not entitled to weight and should not be taken into account. * * *

The rule for which we contend has great importance at the present time. Frequently, military establishments are laid out covering a wide area, although only a part can be improved at the outset. It is convenient to the Government and fair to local communities to condemn the lands as they are needed rather than to take at once all the lands which will be required. The decision below would seriously interfere with that policy by forcing the United States to pay for increases in value accruing as a result of the growth of the establishment to lands whose taking was postponed even though it was known from the outset that the lands would probably be required.

2. In holding that the United States was not entitled to a judgment restoring the amounts received by respondents in excess of just compensation, the court below decided a novel question important in the administration of the Declaration of Taking Act. The opinion of the court gives no reason for its conclusion "That the Court

was without the jurisdiction to enter such judgment is so obvious that we so hold without further discussion" (R. 468).⁴

Analysis of the Declaration of Taking Act in the light of the traditional powers of courts indicates that this decision was probably wrong. Section 1 provides that upon filing a declaration of taking and depositing in court the amount of compensation "estimated" by the acquiring authority to be just, title to the land vests in the United States and the right to just compensation vests in the owners. The just compensation is to be "ascertained and awarded in said proceeding." Finally, section 1 declares:

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally

⁴ The case of *Los Angeles etc. Ry. Co. v. Rumpp*, 104 Cal. 20 (1894), cited by Judge Garrecht, concurring, sheds no light. That decision construed the provisions of the California Code dealing with a condemnor's right to possession prior to final judgment and held that, since under the California constitution a condemnor cannot take possession without first paying compensation, payment of an award estopped the condemnor from recovering any part of it, notwithstanding it should later be found too high. This consideration is not material to interpretation of a federal statute because the federal government can take possession without first paying just compensation. See e. g., *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 658-659.

awarded * * * shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

No provision is made for cases like the present, in which the sums paid on account exceed the just compensation.

There is no indication in these provisions that the United States is to be bound by the deposit of the officer or agency empowered to acquire the property; the amount deposited is only an estimate. If none of the deposit were paid to the landowner prior to the trial, surely it would not be paid over to him upon a finding that it was in excess of the just compensation he was entitled to receive. That the landowner has been paid the money cannot enlarge his rights. The established rule is that the courts will order the repayment of Government monies which the recipient *ex aequo et bono* ought to restore. Cf. *United States v. Wurts*, 303 U. S. 414. Hence, there can be no doubt that the United States can recover the excess amounts which the respondents received.

Upon the procedural question of whether a separate suit is required, the Declaration of Taking Act is also silent. But, as the Court pointed out in *Morgan v. United States*, 307 U. S. 183, 197, "What has been given or paid under the compulsion of a judgment the court will restore when its

judgment has been set aside and justice requires restitution." Cf. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 220; *Baltimore & O. R. Co. v. United States*, 279 U. S. 781, 786. The present case calls for the application of a similar rule. The excess amounts were paid to respondents pursuant to an order of the court. The verdict fixing just compensation established that the sums paid by the order were too high. No issue remained unsettled. In similar cases the state courts have given judgments for restitution instead of remitting the condemnors to unnecessary second proceedings.*

The practical importance of this question is great. The Act contemplates that the deposit will immediately be made available to the landowner for his use pending the determination of just compensation, a provision of vital importance to many condemnees who have lived on their land. The United States must pay 6% interest on the amount by which the award exceeds the deposit. For both reasons it is the practice of the acquiring authority to approximate as near as may be the actual value of the property. The result of the decision below will be to lead acquir-

* See e. g., *Carisch v. County Highway Committee*, 216 Wis. 375, 378 et seq., 257 N. W. 11 (1934); *St. Louis, K. & N. Ry. Co. v. Knapp-Stout & Co.*, 160 Mo. 396, 416-417, 61 S. W. 300 (1901); *Kentucky Hydro-Electric Co. v. Woodard*, 216 Ky. 618, 624-625, 287 S. W. 985 (1926); *Douglas v. Indianapolis Traction Co.*, 37 Ind. App. 332, 338-339, 76 N. E. 892 (1906), 2 Lewis, *Eminent Domain*, sec. 843, p. 1471 (3d ed. 1909).

ing officers to reduce their estimates, with the result that landowners will be required to wait longer for their money and the United States will be required to pay larger amounts of interest.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

APPENDIX

Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421-1422, 40 U. S. C., sec. 258a, reads as follows:

That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

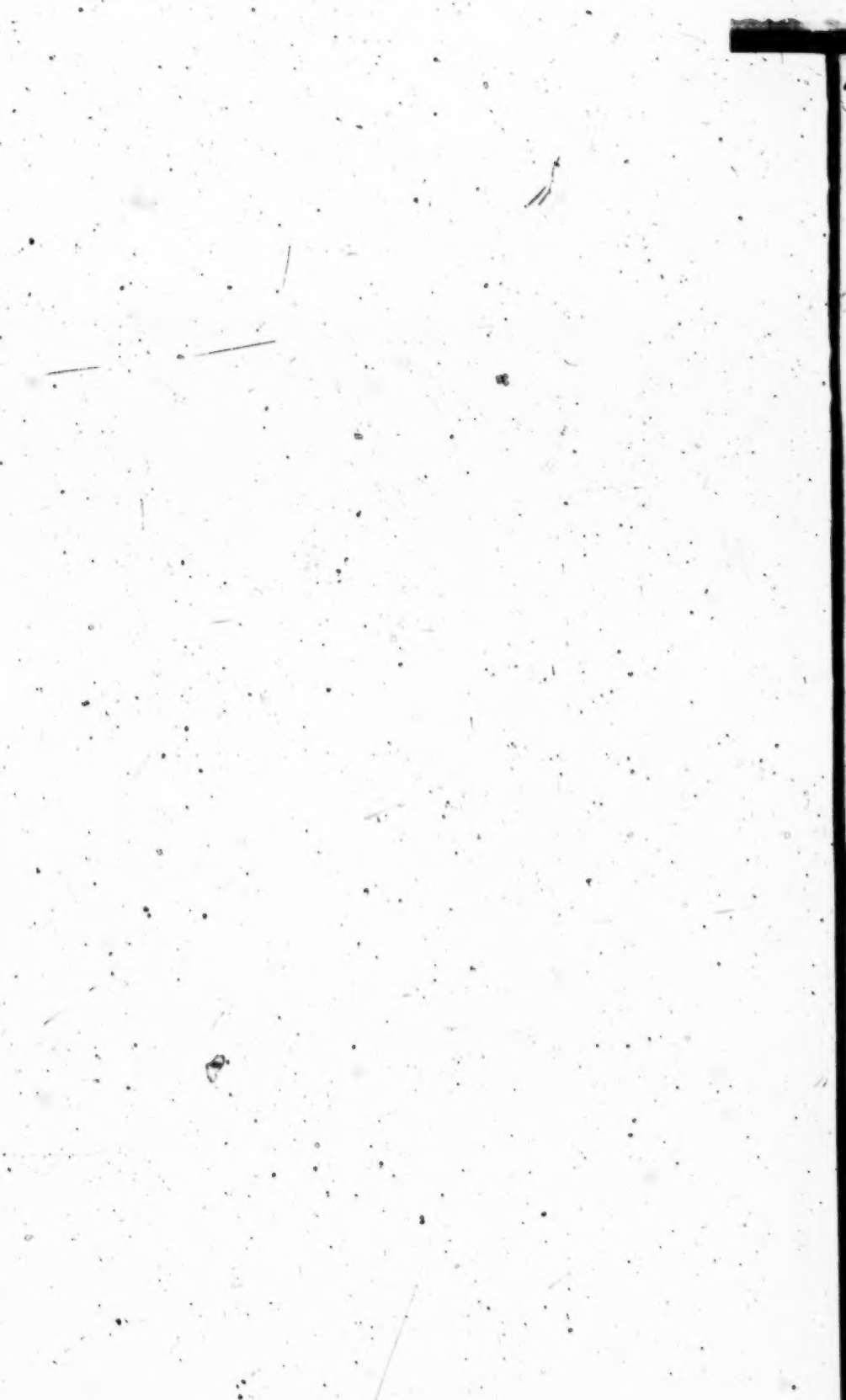
Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the

amount of the estimated compensation stated in said declaration; title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States; and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon

which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.



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CHARLES ELMER CHAPLEY

No. 78

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER;
JOHN J. HUMPHREY, ALSO KNOWN AS JOHN J.
HUMPHREY, SR., ALSO KNOWN AS J. M. HUMPH-
REY; CHARLES J. McCONNELL, ALSO KNOWN AS
CHAS. J. McCONNELL; ELMER JOHNSON AND
HILMA JOHNSON, HIS WIFE; DAVID WILSON
AGNEW; ALBERT ROUGE; AND FLORENCE VAN
SANTEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES



INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute involved.....	2
Statement.....	2
Specification of errors to be urged.....	9
Summary of argument.....	9
Argument:	
I. Just compensation for land condemned does not include increases in value resulting from the announcement of a public project in connection with which the land is later taken.....	12
II. The United States was entitled to a judgment for restitution of the amount by which the deposit under the Declaration of Taking Act exceeded the judicial award of compensation.....	23
Conclusion.....	29
Appendix.....	30

CITATIONS

Cases:	
<i>Baltimore & Ohio R. R. v. United States</i> , 279 U. S. 781.....	12, 28
<i>Benton v. Brookline</i> , 151 Mass. 250.....	22
<i>Cariach v. County Highway Committee</i> , 216 Wis. 375.....	28
<i>Cherokee Nation v. Southern Kansas Ry.</i> , 135 U. S. 641.....	24
<i>Continental Land Co. v. United States</i> , 88 F. (2d) 104, certiorari denied, 302 U. S. 715.....	13
<i>Danforth v. United States</i> , 308 U. S. 271.....	22
<i>Douglas v. Indianapolis Traction Co.</i> , 37 Ind. App. 332.....	28
<i>Egan v. Philadelphia</i> , 108 Pa. Super. 271.....	22
<i>Five Tracts of Land in Cumberland Tp. v. United States</i> , 101 Fed. 661.....	13
<i>Gibson and City of Toronto</i> , Re, 28 Ont. 20.....	22
<i>Hermann v. North Pennsylvania R. R.</i> , 270 Pa. 551.....	22
<i>Kentucky Hydro-Electric Co. v. Woodard</i> , 216 Ky. 618.....	28
<i>Kerr v. South Park Commissioners</i> , 117 U. S. 379.....	16, 17
<i>Lincoln Gas & Elec. Co., Ex parte</i> , 257 U. S. 6.....	28
<i>Los Angeles, etc., Ry. v. Rumpp</i> , 104 Cal. 20.....	23
<i>May v. Boston</i> , 158 Mass. 21.....	22
<i>McCoy v. Union Elevated R. R.</i> , 247 U. S. 354.....	23

Cases—Continued.

	Page
<i>Mowry v. Boston</i> , 173 Mass. 425.....	22
<i>Murray v. United States</i> (App. D. C.), decided July 20, 1941.....	22
<i>Nichols v. Cleveland</i> , 104 Ohio St. 19.....	22
<i>Northwestern Fuel Co. v. Brook</i> , 139 U. S. 216.....	28
<i>Olson v. United States</i> , 292 U. S. 246.....	13
<i>St. Louis Electric Terminal Ry. v. MacAdaras</i> , 257 Mo. 448.....	22
<i>St. Louis K. & N. Ry. v. Knapp-Stout & Co.</i> , 160 Mo. 396.....	28
<i>San Diego Land and Town Co. v. Neale</i> , 78 Cal. 63.....	22
<i>Seaboard Air Line Ry. v. United States</i> , 275 Fed. 77, 261 U. S. 299.....	13, 23
<i>Shoemaker v. United States</i> , 147 U. S. 282.....	10, 14, 16, 17
<i>Shreveport Traction Co. v. Svara</i> , 133 La. 899.....	22
<i>South Twelfth Street</i> , 217 Pa. 362.....	22
<i>Textile Mills Securities Corp. v. Commissioner</i> , 314 U. S. 326.....	26
<i>United States v. Chandler-Dunbar Water Power Co.</i> , 229 U. S. 53.....	13
<i>United States v. Morgan</i> , 307 U. S. 183.....	28
<i>United States v. Wurts</i> , 303 U. S. 414.....	11, 26

Statutes:

Declaration of Taking Act of February 26, 1931, 46 Stat. 1421-1422, Sec. 1 (U. C. S., title 40, sec. 258 (a)).....	2, 24, 30
Act of August 30, 1935, 49 Stat. 1028, 1038.....	3
Act of June 22, 1936, 49 Stat. 1570, 1622.....	3
Act of August 9, 1937, 50 Stat. 564, 597.....	3
Act of August 26, 1937, 50 Stat. 844, 850, Sec. 2.....	2, 3, 32
Act of May 9, 1938, 52 Stat. 291, 324.....	2, 3, 21, 33

Miscellaneous:

Annual Report of the Secretary of the Interior for the Fiscal Year 1936 (p. 64).....	20
Annual Report of the Secretary of the Interior for the Fiscal Year ending June 30, 1937, pp. 7-8.....	3
74 Cong. Reg. 777-778.....	25
H. Rep. No. 2086, 21st Cong., 3d Sess., 1.....	25
2 Lewis, <i>Eminent Domain</i> (3d ed., 1909) 1471, sec. 843.....	28
1 Nichols, <i>Eminent Domain</i> (2d ed., 1917) 675-677, sec. 221.....	22
Rivers and Harbors Com. Doc. No. 35, 73d Cong., 2d Sess., p. 5.....	3

In the Supreme Court of the United States

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SANTEN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court delivered no opinion. The opinion of the circuit court of appeals (R. 466-476) is reported in 125 F. (2d) 75.

JURISDICTION

The judgment of the circuit court of appeals was entered January 22, 1942 (R. 477). The petition

for a writ of certiorari was filed April 22, 1942, and was granted June 1, 1942 (R. 478). Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether just compensation for condemned lands includes increases in value resulting from announcement of the public project in connection with which the lands are later taken.

2. Where a federal officer, pursuant to the Declaration of Taking Act, makes a deposit of estimated compensation which is withdrawn by landowners on order of the court and which exceeds the amount of just compensation later awarded, whether the United States may have judgment in the condemnation proceeding against the landowners for the excess of the withdrawn deposit over the award.

STATUTE INVOLVED

Section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421-1422 (U. S. C., title 40, sec. 258a), section 2 of the Act of August 26, 1937, 50 Stat. 844, 850, and part of the Act of May 9, 1938, 52 Stat. 291, 324, are set forth in the Appendix, *infra*, pages 30-34.

STATEMENT

On April 6, 1934, the Chief of Engineers, United States Army, recommended that the Federal Gov-

ernment contribute \$12,000,000 toward construction of the Central Valley Project dam on the Sacramento River, at that time proposed to be undertaken by the State of California. Rivers and Harbors Com. Doc. No. 35, 73d Cong., 2d Sess., 5. In the next year Congress authorized the appropriation of that amount for the dam. Act of August 30, 1935, 49 Stat. 1028, 1038. On December 22, 1935, the President, upon the recommendation of the Secretary of the Interior, approved construction of the whole Project as a federal reclamation project, for the conservation, regulation, and utilization of the water resources of the Sacramento and San Joaquin Rivers (see R. 236). Congress appropriated \$6,900,000 for the Project in 1936 and \$12,500,000 in 1937. Act of June 22, 1936, 49 Stat. 1570, 1622; Act of August 9, 1937, 50 Stat. 564, 597.¹ In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior stated (pages 7-8) that Shasta, California, had been selected for the site of the Sacramento River dam. The Central Valley Project was reauthorized by Congress in section 2 of the Act of August 26, 1937, 50 Stat. 844, 850.

Construction of the Shasta dam required relocation of thirty miles of the line of the Central Pacific Railroad, for the reservoir behind the dam.

¹ A further appropriation of \$9,000,000 was made by the Act of May 9, 1938, 52 Stat. 291, 324.

would flood part of the existing right-of-way (R. 5-6, 157-158). Lands belonging to respondents were needed for the relocated right of way.² This was staked out on the ground as early as March 1936 with markers at intervals of 100 feet (R. 169, 175, 184-185). An alternative line was also marked by stakes at the same period (R. 177-180).³

Respondents' property was located in an area of Shasta County, approximately four miles from the damsite, known as Boomtown (R. 164-166, 208, 229). The portions of Boomtown in which respondents' lands were situated (Units Nos. 4 and 5) consisted largely of uncleared brush land as late as December 1937 (R. 263-264, 289). The first house in Boomtown was built in Novem-

² Of the land to be condemned Miller, McConnell, and Humphrey owned 10.61 acres (R. 16-22, 422); Elmer and Hilma Johnson owned 4.81 acres (R. 11-14, 421); Agnew owned .02 of an acre (R. 14, 422); Rouge and Van Santen owned, respectively, .047 and .0125 acres (R. 7-11, 420-421).

³ Respondent Miller testified that he did not know "anything as to exactly where that right-of-way was to go" until the condemnation (R. 273). Respondent Agnew testified that he saw no stakes in 1938 when he acquired his land (R. 328). L. R. Kronschnabel, a defendant in the district court who is not a respondent here, testified that he, Miller, Humphrey, and Rouge caused some of the land condemned to be subdivided in 1938 on the assumption that the railroad would be relocated where it later was in fact relocated (R. 290-292). And one George L. Pearl, employed by some of the respondents to subdivide other land (part of which was later condemned), put the proposed right of way of the railroad on a plat which he made in September 1937 (R. 224-226).

ber 1937 (R. 414), and during most of the year little of the land in Boomtown was improved (R. 355-356). Most of the respondents came to Boomtown and acquired land there in 1936 or after.⁴ Two were realtors interested in developing the area.⁵ By December 1938 Boomtown had become built up for business⁶ and residential purposes and was an active (at times even congested) place, owing to the presence of large numbers of persons employed in construction of the nearby dam (R. 204-207).

On December 14, 1938, the Government filed in the District Court of the United States for the Northern District of California, Northern Division, an amended complaint in eminent domain against respondents and others whose lands were needed for the relocated railroad (R. 2-23). On the same day, pursuant to the Act of February 26, 1931, 46 Stat. 1421 (U. S. C., title 40, secs. 258a-258e), a declaration of taking executed by the Acting Secretary of the Interior was filed (R. 23-34). The declaration

⁴ Humphrey (R. 227, 262-263) (1936-1937); Miller (R. 271, 282-283) (1936-1937); Johnson (R. 316) (1937); Agnew (R. 327) (1938); Van Santen (R. 324) (1938). Rouge had owned land in Central Valley (the post-office address of Boomtown) since 1921 (R. 302-303). McConnell did not testify.

⁵ Humphrey (R. 227-228, 261); Miller (R. 271).

⁶ The businesses established comprised "Eating houses, furniture stores, second hand stores, beer parlors, entertainment businesses, fruit markets, produce markets, garages" (R. 206).

estimated \$2,550 as just compensation to be paid for the tract belonging to respondents Miller, Humphrey, and McConnell, and that sum was deposited in court (R. 33-34). Upon the application of those respondents (R. 69-72), the court directed its clerk to pay each of them a third of the deposit, or \$850, on account of the just compensation which they were entitled to receive (R. 73-74).

At the trial respondents sought to introduce evidence of sales of land prior to December 14, 1938, in the vicinity of the land in suit (R. 231). The Government objected to the introduction of this evidence as it would not exclude sales occurring after August 26, 1937, the date on which Congress reauthorized the Central Valley Project as a federal undertaking. The district court sustained the objection (R. 231-232). Respondents did not offer any evidence concerning sales in the vicinity made before August 26, 1937. Thereafter, in testifying as to the value of the land in suit the witnesses were limited to stating the fair market value of the several parcels on December 14, 1938, "leaving out of consideration any increase * * * in that value from and after August 26, 1937, due to the Central Valley Project" (R. 248, 252, 274, 304, 317, 319, 339, 352, 367-369, 406-407). The court, in the charge to the jury, instructed that they were required to find the market value of the property condemned, as of the time of the taking, December 14,

1938 (R. 420, 423). The court further charged (R. 428-429):

As you have already heard, this property is being taken for the so-called Central Valley Project. If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937, such increase or enhancement in value is not to be considered by you. The value you are to fix and award as compensation is the value this land would have had had this project not been announced, planned or constructed on August 26, 1937. It may be that because of this project the use for which the property is suited may have changed. You should consider it only for the use to which it was suited or adapted before that use was changed by the project. The government must not be required to pay for something it has itself made. ☺

You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which may have occurred from and after that date which you may find was attributable to the announcement of plans for or construction of this project.

The jury awarded respondents Miller, Humphrey, and McConnell \$500 for their land and \$100 sever-

ance damages (R. 112).⁷ Since the court had allowed them to withdraw the \$2,550 deposited with the declaration of taking, or \$1,950 more than the compensation determined to be due, judgment was entered against each for \$650, the excess amount which each had received (R. 124-125).⁸

The circuit court of appeals reversed (R. 477), holding (1) that the respondents were entitled to compensation for the value of their lands on the date of the taking, including increases in value resulting from reauthorization of the project in connection with which the lands were taken (R. 468-475), and (2) that the district court lacked jurisdiction to order restitution of the excess amounts which respondents Miller, Humphrey, and McConnell had been paid (R. 468). Judge Garrecht dissented with respect to the first proposition (R. 475-476).

⁷ The testimony as to the value of each of the condemned parcels owned by respondents and the jury's awards with respect to these lands may be summarized as follows:

	Government		Respondents		Jury
Miller, McConnell, and Humphrey	\$110.50	\$219.99	\$17,500	\$20,000	\$300
Johnsons	48.50	48.10	2,900		125
Agnew	30		100	150	15
Rouge	50	6.47	700		50
Van Santen	12½	10.00			10

⁸ The court entered judgment for the other respondents in the respective amounts which the jury by its verdict had awarded (R. 120-124).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that just compensation to respondents for their land included increases in value since August 26, 1937, owing to the Central Valley Project.
2. In holding that the district court lacked jurisdiction to enter judgment for the United States against respondents Miller, McConnell, and Humphrey in the amount of the excess of the deposit withdrawn by them over the award of just compensation.
3. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

Any increase in the value of Boontown lands after August 26, 1937, resulting from the Central Valley Project was created by the Government. Accordingly, when the Government came to condemn respondents' property for relocation of a railroad—which was envisaged as an essential part of the project when the project was announced on August 26, 1937, by the reauthorization statute—any such increase did not constitute an element of just compensation to the landowners. To include it would depart from the principle in eminent domain valuation that both parties must be fairly treated, and would encourage real estate operators

to speculate at government expense in areas where public improvements are being undertaken. The rulings of the district court excluding increases in value after the reauthorization date which were due to the project follow from the decision of this Court in *Shoemaker v. United States*, 147 U. S. 282, and are in accord with the decisions of state courts. The result reached by the district court does not, as the court below stated, exclude from fair value increases after August 26, 1937, owing to causes other than the project.

Equally groundless was the fear of the circuit court of appeals that the rule of the district court in this case would permit the Government, long after a project is undertaken, to condemn new land for a purpose (in connection with the project) which was not contemplated when the project was authorized, paying as compensation an amount which did not include increases in value owing to the project and accruing after the authorization. Relocation of part of the line of the Central Pacific Railroad in the present case was contemplated long before August 26, 1937, the new route was surveyed and marked out on the ground in 1936, and the Act of August 26, 1937 (reauthorizing the Central Valley Project), comprised necessary relocations within its scope.

II

The amount of compensation to be paid a landowner whose property is being condemned is to be

fixed, under the Declaration of Taking Act, by a judicial award. The Government estimates what just compensation will be and deposits that sum in court, solely for convenience—to enable the Government to secure title quickly and to assure the property owner early payment of an amount approximating what will ultimately be found due him. The estimate should not be considered binding on the Government any more than it is binding on the property owner. While the statute is silent on the point, this result is consonant with its provisions generally and with its legislative history; the result is strongly indicated by considerations of justice and policy. Had the deposit remained in court, the judgment for the land owners would have been limited to the amount of the award. The fact that the three respondents here withdrew the estimated compensation deposited should in no way improve their position. Since the Government has paid them too much, it is entitled to recover the excess. Cf. *United States v. Wurts*, 303 U. S. 414.

There is no reason why the recovery must be sought in a separate proceeding, for no issues remain to be determined and it is appropriate to settle finally in the condemnation suit the matter of controversy between the condemnor and the landowner. Although the Declaration of Taking Act does not expressly provide for judgments of restoration to the Government, the district

court had power to order restitution when it appeared that an excessive amount had been paid over to the three respondents pursuant to the court's earlier order. Cf. *Baltimore & Ohio R. R. v. United States*, 279 U. S. 781.

ARGUMENT

I

JUST COMPENSATION FOR LAND CONDEMNED DOES NOT INCLUDE INCREASES IN VALUE RESULTING FROM THE ANNOUNCEMENT OF A PUBLIC PROJECT IN CONNECTION WITH WHICH THE LAND IS LATER TAKEN

The lands here in suit were condemned for use in carrying out the Central Valley Project, an essential part of which was relocation of a portion of the line of the Central Pacific Railroad. In the proceeding to fix just compensation for them, the district court excluded from their value any increase after August 26, 1937, resulting from the Project, on the theory that the Government should not pay in eminent domain for values which it created by undertaking the project in connection with which the instant property was being taken. To this end it limited the testimony of the witnesses concerning fair market value on December 14, 1938, so that it would not reflect any such increase; excluded evidence of sales after August 26, 1937; and instructed the jury not to consider increases in value after the latter date which resulted from announcement of the Central Valley Project. (See

Statement, pages 6-7, *supra*.) Thus, the court did not exclude increases in value due to causes other than the announcement and commencement of the project, as for example increases resulting from a discovery of valuable minerals.

Hence, the disputed element is increase in value after August 26, 1937, resulting from the undertaking of the Shasta dam construction in the vicinity of Boomtown, which brought large numbers of construction personnel to the area and presented the opportunity for business and residential development of Boomtown.⁹

The rule is settled that any increase owing to the condemnor's necessity for or proposed use of the land is not to be allowed as a constituent of fair market value at the time of taking.¹⁰ See *Olson v. United States*, 292 U. S. 246, 256, 261. The basis

⁹ It was not until after August 26, 1937, when Congress reauthorized the Central Valley Project, that this development materialized. (See Statement, pages 4-5, *supra*).

¹⁰ The district court did, however, include in its charge an instruction that "The government may not be required to pay any increase in the value of the property which it has caused by reason of its contemplated taking of the property by eminent domain proceedings. Any rise in value before the taking should be allowed to the property owners but not any rise caused by the expectation that the government intended to condemn the property" (R. 428). This instruction was clearly correct. *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53; *Seaboard Air Line Ry. v. United States*, 261 U. S. 299; *Continental Land Co. v. United States*, 88 F. (2d) 104 (C. C. A. 9), certiorari denied, 302 U. S. 715; *Five Tracts of Land in Cumberland Tp. v. United States*, 101 Fed. 661 (C. C. A. 3).

of this rule is that the public ought not to be required to pay for a value which it has created. The rule for which the Government is contending in the present case rests on the same basis. It differs in the fact that here it was not known, when the Central Valley Project was announced as a federal undertaking, exactly what land would be taken for relocation of the railroad; any increase in the value of respondents' land therefore was owing in part to the possibility that respondents would continue to hold the property and thus enjoy the economic benefits of the construction boom. But this increase is attributable to the Government's project; that the increase resulted indirectly rather than immediately should not enlarge the Government's liability when it condemns the property for use in the project which enhanced its value.

The result reached by the district court in excluding from the value of respondents' lands when taken any increase after August 26, 1937, owing to the Central Valley Project, is squarely supported by the decision of this Court in *Shoemaker v. United States*, 147 U. S. 282. In that case the facts were as follows: Congress enacted in 1890 a statute to provide for the establishment of a public park along Rock Creek in the District of Columbia. Within specified limits commissioners were to select not exceeding 2,000 acres of land for the park. In 1891 the commissioners prepared a map of the property they had selected. In proceedings to con-

denn some of the land, the Supreme Court of the District of Columbia instructed the appraisers that they should "receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September, 1890, authorizing said park, * * *" (see 147 U. S. at 303). The court further instructed (*id.* at 304):

* * * They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes, nor can they consider the value given them by the establishing the park, * * *.

This action of the District of Columbia court exactly paralleled that of the district court in the present case. In the *Shoemaker* case enactment of the statute of 1890 announced the project for Rock Creek Park. The announcement may have enhanced land values within the geographical limits set by Congress because of the possibility that the United States might take particular land or if it did not that the land would benefit from the proximity of the park. Accordingly, the court excluded from the value of land taken any increase after September 27, 1890, owing to these causes. This Court sustained the instructions given by the Supreme Court of the District (147 U. S. at 305).

A majority of the circuit court of appeals thought that *Shoemaker v. United States* was distinguishable. Pointing to this Court's citation (147 U. S. at 305) of *Kerr v. South Park Commissioners*, 117 U. S. 379, the court below explained the *Shoemaker* decision on the basis of the *Kerr* case. In the latter case evidence of sales of lands near the lands condemned, which sales had been made after the boundaries of a proposed park had been fixed, was excluded because the sale prices would reflect an increase in value (owing to prospective benefits from the neighboring park) which the condemned property could not have because it would be part of the park. The court below reasoned that the first instruction in the *Shoemaker* case was upheld because it ruled out evidence concerning sales of lands which were not similar to the lands condemned. We submit that this analysis of the *Shoemaker* decision is unsound and is based on the assumption, first, that the lines of Rock Creek Park were fixed upon passage of the act authorizing establishment of the park and, second, that this Court so regarded the situation (see R. 473). It is apparent from the Act of September 27, 1890, that this assumption is erroneous; in fact, the commissioners were required to select within stated limits an area not exceeding 2,000 acres; and this Court's Statement in the *Shoemaker* case (147 U. S. at 284) shows that it so understood the facts. As Judge Garrecht remarked in his dissenting opinion below (R. 475), the boundaries of Rock Creek Park were

probably less clearly ascertainable on September 27, 1890, than was the line for railroad relocation here on August 26, 1937; before that date stakes marking the proposed route had been set out, and the testimony of two witnesses (see Statement, *supra*, page 4, note 3) discloses that this route was known to some at least of the respondents.

The Court in *Shoemaker v. United States* (107 U. S. at 304-305) approved a second instruction: that the appraisers should not "consider the value given * * * [the lands] by the establishing the park." Under its terms no increase after September 27, 1890, in the value of lands situated within the permissive limits set by Congress and later condemned was to be allowed as an element of compensation if the increase resulted from anticipation of the park project. Approval of this instruction is plainly authority for the parallel instruction given by the district court in the instant case (R. 428-429) and for its rulings limiting the testimony concerning value. (See Statement, *supra*, pages 6-7.) The circuit court of appeals discussed the second instruction approved in the *Shoemaker* case "under the separate heading 'Time of Fixing Values'" (R.

"The court below referred (R. 473) to the approval in the *Kerr* case (117 U. S. at 385) of an instruction (*id.* at 384) that increases in the value of land (sought to be condemned for park purposes) which resulted from anticipation of legislation establishing the park should be considered in estimating just compensation. But it should be noted that this instruction was limited to increases which had occurred before the legislation was enacted and, therefore, before the "project" was definitively approved. Such increases were likewise allowed in the instant case.

473-475). We submit that in doing so the circuit court of appeals showed its misconception of the holding of the *Shoemaker* case. The questions raised by the two instructions in the *Shoemaker* case, and by the action of the district court in this case are aspects of a single problem: whether just compensation includes increases resulting from announcement of a project in connection with which the property is later taken.

The court below in its discussion of the "Time of Fixing Values" stated the Government's position as being "that values of real properties which may possibly be taken by the Government are frozen at the values existing at the time of determining upon the construction of a public improvement" (R. 473).¹² It is clear, however, from the rulings and instructions of the district court that only increases in value (after August 26, 1937) which were owing to the Central Valley Project were to be excluded; the questions put to the witnesses were framed in exactly this way. The holding of the district court permitted consideration of increases (after the reauthorization date) which were owing to causes other than the project. If,

¹² In its preliminary statement the court referred to the district court's "holding that the fair market value of the lands taken on December 14, 1938 * * * was to be established without taking into consideration any increase in value which occurred after the passage of the Central Valley project authorization Act of August 26, 1937" (R. 468).

for example, commercially important minerals had been discovered in the lands of respondents, the resultant rise in the worth of the property would have been taken into account.

The circuit court of appeals thought that the rule of the district court would work injustice on property owners because "Any governmental activity in connection with the improvement in any reasonable vicinity of the site of the improvement would give the Government the right to step in and condemn property at its market value as of a date immediately preceding announcement of the intended improvement, notwithstanding its legitimate rise in market value for ordinary commercial purposes. Long after commencement of the improvement the Government officials could make up their minds that an administration building should be erected upon a certain corner of a town established since the beginning of and because of the improvement" (R. 474). It is plain that the district court here did not go so far. Relocation of the railroad was an essential part of the Central Valley Project as it was planned at the time of the reauthorization statute, and more particularly was a necessary step in construction of the Shasta dam (which resulted in the development of Boomtown). Not only was relocation contemplated as part of the project when the reauthorization statute was passed, but the proposed line of the relocated railroad had even earlier been marked on the ground

and had been made known to some of the respondents.

We think that the court below was in error when it said (R. 468): "It must be borne in mind at all times that none of the lands, the subject of this action, were lands contemplated for use by the Government in the terms of the [reauthorization] Act." That statute conferred power in the broadest terms to carry forward the project: "* * * the Secretary of the Interior * * * may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for" the project. Section 2 of the Act of August 26, 1937, 50 Stat. 850. (set forth in Appendix, *infra*, pp. 2-3). Congress had before it when it enacted these provisions the Annual Report of the Secretary of the Interior for the fiscal year 1936, which stated (p. 64) that the Bureau of Reclamation had completed surveys for the relocation of 30 miles of railroad in the Shasta Dam area of the Central Valley Project.¹³ Cf. R. 158; see Statement, *supra*, p. 3. If Congress had intended to restrict the authority of the Secretary so as not to include the power to condemn for relocation purposes, it would have used less sweeping language in the face of the Secretary's statement

¹³ In his annual report for the fiscal year ending June 30, 1937, the Secretary stated (pp. 7-8) that construction was planned for 1938 on relocation of the line of railroad involved in this case.

of what the Department of the Interior was then proposing to do. The fact that Congress in a later act,¹⁴ appropriating additional funds for the Central Valley Project, inserted a specific authorization for the Secretary to purchase or condemn land for relocation of highways, railroads, and transmission lines in no way detracts from the broad authority earlier granted. The later statute can only be taken as a clarifying provision, inserted in the appropriation act from abundance of caution.¹⁵

We think that no injustice to landowners will result if in the present case increases in value after August 26, 1937, owing to the Central Valley Project, are excluded from consideration. Any such increases are created by the action of the condemnor in undertaking an improvement, and the public should not be required to pay them, just as it is not required to pay increases allocable to the condemnor's necessity or proposed use. To hold otherwise would encourage speculation in land values in areas where the Government is undertaking public works programs with the consequence that the cost to the Government of land needed in a project, but not at first specifically settled on for condemnation, would become unreasonable. The

¹⁴ Act of May 9, 1938, 52 Stat. 291, 324.

¹⁵ The legislative history of the Acts of August 26, 1937, and May 9, 1938, sheds no light on the scope of the power conferred on the Secretary by the former or the reason for inserting in the latter the specific authority to condemn for relocation.

mushroom growth of Boomtown after August 1937 is an apt illustration. At least five of the respondents first acquired their holdings of land in 1936, 1937, and 1938 in anticipation of the Central Valley Project, and two of them were realtors actively promoting the boom.

The rule of valuation for which the Government has contended in this case is supported by numerous authorities, in addition to *Shoemaker v. United States*, *supra*. If authorization of the Central Valley Project had depressed the value of respondents' lands, the Government could not have discharged its obligation to make just compensation by paying the depreciated prices. *South Twelfth Street*, 217 Pa. 362, 366; *Hermann v. North Pennsylvania R. R.*, 270 Pa. 551, 553 *et seq.*; *Re Gibson and City of Toronto*, 28 Ont. 20, 28 *et seq.*; cf. *Danforth v. United States*, 308 U. S. 271, 285. The converse of this proposition should be true. See *Murray v. United States* (App. D. C.), decided July 20, 1942; 1 Nichols, *Eminent Domain* (2d ed. 1917) 675-677, sec. 221. It has been so held in numerous cases. *San Diego Land and Town Co. v. Neale*, 78 Cal. 63, 74-75; *Shreveport Traction Co. v. Svara*, 133 La. 899, 907-910; *Benton v. Brookline*, 151 Mass. 250, 257 *et seq.*; *May v. Boston*, 158 Mass. 21, 29-31; *Mowry v. Boston*, 173 Mass. 425, 426-428; *St. Louis Electric Terminal Ry. v. MacAdaras*, 257 Mo. 448, 463-469; *Nichols v. Cleveland*, 104 Ohio St. 19, 34; *Egan v.*

Philadelphia, 108 Pa. Super. 271, 274-277; *Seaboard Air Line Ry. v. United States*, 275 Fed. 77, 82-83 (E. D. S. C.). It is true that the owners of lands which are not taken in connection with the public improvement may receive a windfall through enhanced value on account of proximity. But the Government's liability to those whose land it condemns is not thereby increased. This Court has stated: "There is no guarantee that he [whose land is taken] shall derive a positive pecuniary advantage from a public work whenever a neighbor does." *McCoy v. Union Elevated R. R.*, 247 U. S. 354, 366.

II

THE UNITED STATES WAS ENTITLED TO A JUDGMENT FOR RESTITUTION OF THE AMOUNT BY WHICH THE DEPOSIT UNDER THE DECLARATION OF TAKING ACT EXCEEDED THE JUDICIAL AWARD OF COMPENSATION

The court below held, without giving any reason, that the district court lacked jurisdiction to order respondents Miller, McConnell, and Humphrey to restore to the Government the difference between the award and the deposit, which they had received before trial.¹⁶ Section 1 of the Act of February 26,

¹⁶ The majority opinion of the circuit court of appeals referred to no authority in support of its conclusion. Judge Garrecht, who concurred with the majority on this question, cited *Los Angeles, etc. Ry. v. Rumpp*, 104 Cal. 20. That case held that under the California Code a condemnor was estopped to recover part of an award paid before trial if it were later found to be too high, because under the state con-

1931, 46 Stat. 1421-1422 (U. S. C., title 40, sec. 258a), under which this case arises, provides, in part:

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded * * * shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

While the act thus provides for the case where the compensation judicially awarded is greater than the amount received from the deposit, it does not take care of the occasional situation where the reverse is true. The statute of course does not make the deposit binding on the Government, and no reason appears why such a result should be read into it.¹⁷ On the contrary, it is only reasonable to

stitution a condemnor cannot take possession of land without first paying just compensation. Since the Federal Constitution does not impose such a requirement (see, e. g., *Cherokee Nation v. Southern Kansas Ry.*, 135 U. S. 641, 658-659), the state decision is not relevant in interpretation of the federal Declaration of Taking Act.

¹⁷ The legislative history of the Declaration of Taking Act is not directly helpful in interpreting the statute for the purposes of this case since the question here involved apparently did not present itself when the measure was being considered. However, such statements as were made regarding the effect

conclude that in every case the landowner shall receive the amount of compensation judicially awarded, not less and not more. If the estimated just compensation¹⁸ is less than the award, a judgment for the deficiency is to be entered in favor of the landowner; equally a judgment in favor of the United States should be entered for any overpayment. If none of the deposit were turned over to the landowner before trial, surely the whole would not be later paid to him when compensation in a lesser amount had been deter-

of the proposed legislation confirm rather than negative the view for which the Government is contending.

The Committee report, recommending to the House of Representatives passage of the bill, stated:

"* * * By this bill it is sought merely to provide a means whereby the Government may take title immediately, and leave the amount of compensation to be determined by the court according to the usual procedure." [H. Rep. No. 2086, 71st Cong., 3d Sess. 1.]

And the Chairman of the House Judiciary Committee stated of the measure—

"* * * It is simply taking up a general procedure in condemnation and altering that procedure in one particular, to wit, so that the Government will not be obstructed and hindered by unnecessary motions and appeals, but may pay the money into the court where the proceeding is pending, and let that money stand for the result of the condemnation procedure." [74 Cong. Rec. 777-778.]

¹⁸The statute speaks of the amount stated in the declaration of taking, and to be contemporaneously deposited with the court, as estimated just compensation, indicating that this amount is not conclusive; the just compensation is to be "ascertained and awarded in * * * [the judicial] proceeding and established by judgment therein * * *"

mined as just. The fact of payment before the determination of just compensation should not enlarge the property-owner's ultimate rights. Respondents Miller, McConnell, and Humphrey have received more than their due. It is well settled that the courts will order the repayment of government moneys which the recipient in justice ought to restore. *United States v. Barlow*, 132 U. S. 271, 281-282; *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 211-212; *United States v. Wurts*, 303 U. S. 414. Therefore, we think that the United States can recover the excess amounts which those three respondents have received.

In addition to the reasons already advanced, there are strong reasons of policy which persuade in favor of the result reached by the district court and which should be influential in the absence of a clear manifestation of congressional intent. Cf. *Textile Mills Securities Corp. v. Commissioner*, 314 U. S. 326, 334-335. The purpose of the Declaration of Taking Act is to enable the Government to obtain quickly possession and title of land which it proposes to take in eminent domain and at the same time to afford the landowner the opportunity to receive contemporaneously an amount fixed by government officers which approximates the just compensation ultimately to be fixed. In order to effectuate this purpose of fairness to landowners and to relieve the Government of pay-

ing large amounts of interest (which it must pay at 6% per annum from the date of taking on the excess of the award over the deposit), acquiring officers of the Government in setting their estimates of compensation approximate as nearly as possible the actual value of the property being condemned. If the decision below stands, those officers in discharging their duties to the United States may be led to reduce their estimates by weighing the risk of overappraisal against the undesirable consequences of insufficient deposit. Such a result, tending to thwart the purpose of the statute to give quick and ample compensation to the landowner and tending to impose an unnecessary obligation on the Government to pay interest, has no advantages to recommend it and should not be upheld.

If restitution may be obtained by the Government at all, as we submit that it may, there would seem to be no reason why it should not be given in the condemnation proceeding, thus disposing finally of the matter in suit between the condemnor and the property-owner. A separate action by the Government would serve no purpose. After the award of compensation has been made, only an arithmetical computation is required to show whether and in what amount the United States is entitled to judgment against a property-owner who has withdrawn the deposit of estimated compensation; no issue remains unsettled for which a

trial or hearing would be necessary. To remit the condemnor to a second proceeding produces only formal litigation, resulting in waste of the parties' time and resources.

In cases similar to the present one, state courts have given judgments for restitution in the principal proceeding rather than require a further, separate proceeding. *Carisch v. County Highway Committee*, 216 Wis. 375, 378 *et seq.*; *St. Louis, K. & N. Ry. v. Knapp-Stout & Co.*, 160 Mo. 396, 416-417; *Kentucky Hydro-Electric Co. v. Woodard*, 216 Ky. 618, 624-625; *Douglas v. Indianapolis Traction Co.*, 37 Ind. App. 332, 338-339; see 2 Léwis, *Eminent Domain* (3d ed., 1909) 1471, sec. 843.

Decisions of this Court show that the district court had jurisdiction to achieve that result. Where money has been given or paid by one party in litigation to another party under the compulsion of a judgment or order of the court, the court will order restitution if its judgment or order is later set aside and justice requires that the payment be restored. *Baltimore & Ohio R. R. v. United States*, 279 U. S. 781; *Ex parte Lincoln Gas & Elec. Co.*, 257 U. S. 6; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216; see *United States v. Morgan*, 307 U. S. 183, 197.

In the instant case all of the \$2,550 deposited by the United States as estimated just compensation for the lands of Miller, McConnell, and Humphrey was paid to those respondents at the

district court's order. It later appeared that the just compensation amounted to only \$600. Thus the earlier order for payment was disclosed to have created an inequitable result, as in the cases where a district court's judgment supporting an order of payment was reversed on appeal. Accordingly, the district court properly ordered repayment here of \$1,950 by respondents to the United States.

CONCLUSION

The district court ruled correctly on the valuation of respondent's lands, and properly gave judgment of restitution in favor of the United States against respondents Miller, McConnell, and Humphrey for the excess of the deposit paid to them over the award of just compensation. It is therefore respectfully submitted that the judgment of the circuit court of appeals should be reversed.

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OCTOBER 1942.

APPENDIX

Section 1 of the Act of February 26, 1931, 46 Stat. 1421-1422 (U. S. C., title 40, sec. 258 (a)), provides:

That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the

amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner.

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The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Section 2 of the Act of August 26, 1937, 50 Stat. 844, 850, provides:

That the \$12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclama-

tion of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

The Act of May 9, 1938, making appropriations for the Department of the Interior for the fiscal year ending June 30, 1939, 52 Stat. 291, 324, provided for the—

Central Valley project, California, \$9,000,000, together with the unexpended balance of the appropriation for this project, contained in the Interior Department Ap-

appropriation Act; fiscal year 1938, with authority in connection with the construction of the Central Valley project, California; (1) to purchase or condemn and to improve suitable land for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmission lines or other properties the relocation of which, in the judgment of the Secretary of the Interior, will be necessitated by construction or operation and maintenance of said project, (2) in full or part payment for said properties to be relocated, to enter into contracts with the owners of said properties to be relocated whereby they undertake in whole or in part the property acquisition and work involved in relocation and, in said Secretary's discretion, to pay in advance for said work undertaken by said owners; and (3) to convey or exchange acquired rights-of-way or other lands or rights-of-way owned or held by the United States for use in connection with said project, or to grant perpetual easements therein or thereover, or to undertake improvement or construction work connected with said relocations, for the purpose of effecting completely said relocations;

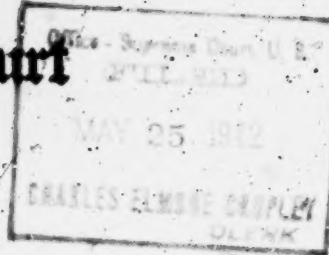
FILE COPY

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1941

No. 1166 78



UNITED STATES OF AMERICA,

Petitioner,

vs.

VICTOR N. MILLER, also known as Vic Miller;
JOHN J. HUMPHREY, also known as John J.
Humphrey, Sr., also known as J. M. Hum-
phrey; CHARLES J. McCONNELL, also known
as Chas. J. McConnell; ELMER JOHNSON
and HILMA JOHNSON, his wife; DAVID WIL-
SON AGNEW, ALBERT ROUGE and FLORENCE
VAN SANTEN,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Subject Index

	Page
The decision of the Circuit Court of Appeals is in accord with the decisions of this court on the proper measure of compensation	4
The Circuit Court of Appeals correctly decided that the action of the District Court in summarily entering judgment in favor of petitioner and against certain respondents for the amount of money paid to said respondents in excess of the verdict was unauthorized and void.....	9
A proper interpretation of the statute sustains the decision of the Circuit Court of Appeals.....	10

Table of Authorities Cited

Cases	Pages
Baer v. Smith, 201 Cal. 87, 255 P. 827	10
Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270	7
Beveridge v. Lewis, 137 Cal. 618, 70 Pac. 1083	6, 7
Board of Levee Inspectors v. Crittenden, C. C. A., 94 Fed. 613	7
Danforth v. United States, 308 U. S. 271, 84 L. ed. 240	4
Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142	4
Kelley v. Benton (C. C. A. 9th), 179 F. 466	10
Los Angeles v. Marblehead L. Co., 95 C. A. 602, 273 Pac. 131	7
Olson v. United States, 292 U. S. 246, 78 L. ed. 1236	4
Osage Oil etc. Co. v. Continental Oil Co., 34 F. (2d) 585	10
Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083	4
Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170	5
United States v. Alcorn, 80 Fed. (2d) 487	7, 9
United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 1063	4
United States v. Klamath and other Tribes, 304 U. S. 119, 82 L. ed. 1219	4, 5
United States v. Rogers, 255 U. S. 163, 65 L. ed. 566	4
U. S. Nat. Bank of L. A. v. Jones, 24 C. A. 514, 141 P. 1073	10

Codes

U. S. C. A. Title 33, Sec. 595	8
--------------------------------------	---

Texts

18 Am. Jur. 944, Sec. 299	7
29 C. J., Sec. 1064	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1166

UNITED STATES OF AMERICA,

Petitioner,

vs.

**VICTOR N. MILLER, also known as Vic Miller;
JOHN J. HUMPHREY, also known as John J.
Humphrey, Sr., also known as J. M. Hum-
phrey; CHARLES J. McCONNELL, also known
as Chas. J. McConnell; ELMER JOHNSON
and HILMA JOHNSON, his wife; DAVID WIL-
SON AGNEW, ALBERT ROUGE and FLORENCE
VAN. SANTEN.**

Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

The judgment of the Circuit Court of Appeals for the Ninth Circuit, which petitioner seeks to review, reverses a judgment of the District Court for the

Northern District of California in a proceeding in eminent domain. It was an ordinary action in eminent domain, filed by the Government through the Secretary of the Interior to acquire several parcels of land for the relocation of a railroad, made necessary through the construction of the Shasta Dam, a feature of the Central Valley Project, and, as the issues were framed, the case presented no unusual or important questions of law or fact. The questions which counsel for petitioner now asserts to be of such national importance as to warrant the granting of certiorari by this Court, have resulted from the conduct of the case in the District Court by counsel for the Government. —

The judgment of the District Court, in fixing the awards of compensation made to the several landowners, was based upon the verdict of the jury. By this verdict absurdly low verdicts were returned, the findings of the jury being apparently predicated upon the rulings of the District Judge.

For the parcels of land affected by this appeal the awards made by the verdict and judgment are set forth in the footnote.¹

¹Parcel No. 1. (a) Albert Rouge; value of land taken \$50.00; severance damage, nil;

(b) Miller, Humphrey and Kronsehnabel, value of land taken \$160.00; severance damage, \$75.00;

(c) Florence Van Santen, value of land taken, \$10.00; severance damage, nil.

Parcel No. 4. (a) Elmer Johnson and Hilma Johnson, value of land taken, \$125.00; severance damage, \$120.00.

Parcel No. 6. (a) David Wilson Agnew, value of land taken, \$15.00; severance damage, nil.

Parcel No. 7. (a) McConnell, Miller and Humphrey, value of land taken, \$500.00; severance damage, \$100.00.

By its judgment the District Court, in addition to awarding compensation for the lands taken, awarded judgment to the Government against three of the respondent landowners, Miller, Humphrey and McConnell, for the sum of \$650.00 each, this being the amount in excess of the verdict which had been deposited in Court with the declaration of taking, when title to their land was taken, and paid to said respondents under an order of the District Court.

In awarding such a judgment against said respondents, the Court outside of the issues, made the award without process or notice to said landowners, nor was any proceeding taken in the District Court to vacate the order under which the money had properly been paid to respondents.

By the decision of the Circuit Court of Appeals, the judgment of the District Court was reversed,

First, for the reason that said judgment is not, nor is the verdict of the jury upon which it is based, supported by any proof showing the value of the property condemned at the date of taking; under the rulings of the District Court the respondents were deprived of a trial of that issue;

Second, the District Court erred in summarily awarding a judgment, outside of the issues, in favor of the Government and against respondents Miller, Humphrey and McConnell, for the sum of \$650.00 each.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT ON THE PROPER MEASURE OF COMPENSATION:

This Honorable Court has uniformly held that the value at the time of taking is the measure of the compensation to which the land owner is entitled when property is taken by the Federal Government in eminent domain.

United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 1063;

United States v. Rogers, 255 U. S. 163, 65 L. ed. 566;

Olson v. United States, 292 U. S. 246, 78 L. ed. 1236;

Danforth v. United States, 308 U. S. 271, 84 L. ed. 240.

In cases of inverse condemnation the property owner is entitled to compensation fixed by the same rule.

Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083;

United States v. Klamath etc. Indians, 304 U. S. 119, 82 L. ed. 1219;

Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142.

In the *Phelps* case, *supra*, the Court said that the landowners "are entitled to have the full equivalent of the value of such use at the time of taking paid contemporaneously with the taking".

In the *Olson* case this Court said:

"That equivalent is the market value of the property at the time of taking contemporaneously paid in money."

In the decision of the case of *United States v. Klamath and other Tribes*, 304 U. S. 119, 82 L. ed. 1219, the Court said:

"The established rule is that the taking of property by the United States in the exercise of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

It is significant that all of the foregoing decisions of this Court have been rendered since the decision in the case of *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, and yet in none of said cases has said *Shoemaker* case been cited or construed as supporting the contention advanced by appellee in the Court below in respect to the form or substance of the proof of value and damages that is admissible in actions where land is condemned for a federal project.

"It is fair to say, we believe, that the question which counsel for petitioner here attempts to clothe with grave importance is really an old and settled question introduced in a new and somewhat fantastic guise, that question being,

What consideration is to be given to the *general benefits* which result from a public improvement in fixing the compensation and damages that must be paid to a landowner whose property is taken for such improvement by proceedings in eminent domain?

Considering the question from this aspect, we believe the fallacy of the argument that "the govern-

ment must not be required to pay for something it has itself made" becomes manifest. It is the equivalent of saying that the value of general benefits, common to the community, should be deducted in fixing the damages payable to the landowner for property taken in eminent domain; and this is contrary to the accepted rule.

General benefits have been defined as being "an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement." (*Beveridge v. Lewis*, 137 Cal. 619, 623, 70 Pac. 1083.)

The general benefits that result from the construction of a public improvement are the natural result of the creation of said improvement by the condemnor, whether it be the Government, a municipal corporation, or a public utility. They are "conjectural and incapable of estimation". (Id. 137 Cal. 624.)

If it had been announced in 1937 that the Central Pacific Railway Company, instead of the Government, was going to construct a line of railroad through the area involved in this case, and later, in December, 1938, said company had filed a suit to condemn a right of way for said railroad, could the railroad company contend that in fixing the compensation payable to the landowner for the right of way, there would have to be excluded the amount of any increase in the value of the property due to the announcement of the project in 1937? The answer to this question, manifestly, must be in the negative.

Does not the constitutional guarantee of just compensation, i.e., value at the time of taking, apply in all cases with equal effect, whether condemnation be sought by the Government or by a private corporation engaged in a public use?

This subject of benefits, as related to eminent domain, is given very exhaustive consideration in the opinion of this Court in the case of *Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270.

It is now the general rule that there should be no deduction for general benefits from the damages recoverable in condemnation.

Beveridge v. Lewis, 137 Cal. 618, 70 Pac. 1083;

Los Angeles v. Marblehead L. Co., 95 C. A. 602, 273 Pac. 131;

United States v. Alcorn, 80 Fed. (2d) 487;

Board of Level Inspectors v. Crittenden, C. C. A., 94 Fed. 613-617;

18 *Am. Jur.* 944, Sec. 299;

29 *C. J.*, Sec. 1064.

In *Bauman v. Ross*, supra (167 U. S. 548, 42 L. ed. 270), this Court quotes with approval from a decision of the late Justice Brewer, written when he was a member of the Supreme Court of Kansas. (167 U. S. at page 581, 42 L. ed. at page 285.) After declaring that direct benefits to the owner of private property taken for public use were to be considered a part of the compensation he receives, Justice Brewer said:

"We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the

public; for he pays in taxation for his share of such general benefits."

When the District Court in the present case required the respondents to exclude from their valuation evidence "any increase in the value of the property due to the Central Valley Project", and permitted the Government's witnesses to eliminate said element in giving their testimony on value, the obvious effect of the ruling was to charge general benefits against the compensation to be recovered by the landowner.

This was error, and the judgment of the District Court has properly been reversed by the Circuit Court of Appeals.

As a matter of fact, the proper procedure for the consideration of benefits in a case of this kind, is now governed by statute. (U. S. C. A. Title 33, Sec. 595.)²

The Congress, in making express provision in said Act for the offset of any "special and direct benefits", very clearly indicates that it was not intended

²*Consideration of Benefits in Assessing Compensation.* In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken, or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement and shall render their award or verdict accordingly."

that general benefits were to be considered by way of reducing the compensation to be awarded. (*United States v. Alcorn*, 80 F. (2d) 487.)³

THE CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THAT THE ACTION OF THE DISTRICT COURT IN SUMMARILY ENTERING JUDGMENT IN FAVOR OF PETITIONER AND AGAINST CERTAIN RESPONDENTS FOR THE AMOUNT OF MONEY PAID TO SAID RESPONDENTS IN EXCESS OF THE VERDICT WAS UNAUTHORIZED AND VOID.

On this feature of the case there can be no doubt that the decision of the Circuit Court of Appeals is correct,

First, from the standpoint of procedure; and

Second, as a matter of statutory interpretation.

The circumstances which are urged by the Solicitor General as being of sufficient importance to justify a review of this feature of the decision by certiorari are matters which should be addressed to the Congress, if the public interest requires an amendment of the Declaration of Taking Act.

It is undisputed that the award in favor of the United States, plaintiff below, and against the respondents Miller, Humphrey and McConnell, for the recovery of \$650.00 from each of said respondents,

³The opinion in said case discloses that the government there made substantially the same contention as it has made here. "The government contends that the increase in value of the property due to the announcement of the Bonneville Project should be deducted from the amount of the award, and that the rulings and instructions of the court to the jury, and the rejection of the government's evidence and instructions on that subject were erroneous." (From Opinion p. 488.)

was not within the issues raised by the pleadings in the case, and was incorporated in the judgment by the District Judge without process, and without notice to the parties.

A decree, in so far as it undertakes to decide issues not made by the pleadings, is *coram non judice* and void.

Osage Oil etc. Co. v. Continental Oil Co., 34 F. (2d) 585;

Baer v. Smith, 201 Cal. 87, 99, 255 P. 827;

Kelley v. Benton (C.C.A. 9th), 179 F. 466;

U. S. Nat. Bank of L. A. v. Jones, 24 C. A. 514, 141 P. 1073.

**A PROPER INTERPRETATION OF THE STATUTE SUSTAINS
THE DECISION OF THE CIRCUIT COURT OF APPEALS.**

The following phrases of the Declaration of Taking Act, which is printed as an appendix to the petition herein, negative any implication that the Government is entitled to judgment against a landowner for the return of the money deposited in the registry of the Court and withdrawn by the landowner in pursuance of the Act, viz.:

(a) The deposit in the Court is made "to the use of the persons entitled thereto";

(b) Upon the filing of the declaration of taking and such deposit in the Court, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said

declaration, shall vest in the United States of America”;

(c) “Interest shall not be allowed on so much” (of the final award) “as shall have been paid into the court”;

(d) “Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith *for or on account* of the just compensation to be awarded in said proceeding”;

(e) In case the compensation finally awarded “*shall exceed* the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency”. (Italics ours.)

The statute having expressly authorized payment of the whole deposit to respondents, without any condition attached, we submit that they are entitled to retain same. Had it been the intention of the Congress to provide for the recapture of said payment, such a condition would have been definitely expressed and incorporated in the Act, for it cannot be supplied by implication in view of the other provisions of the statute and the necessity of interpreting same in the light of the Fifth Amendment.

Implicit in the statute, in view of the foregoing provisions of the Act and the Fifth Amendment, is the intention of Congress that when the Government exercises its right under the statute to take property for public use in advance of judgment, the landowner

shall be entitled to the amount of money that is deposited in the Court; to have and use it immediately, if he so desires, and to recover any deficiency, with interest, if the final award exceeds the amount he has received.

Clearly, the phrase, "for or on account of" the just compensation to be awarded in said proceeding must be construed according to the ordinary and accepted meaning of such words; the word "for" would thus be construed to mean "in payment of", and the words "on account of" as meaning in "part payment of" the just compensation to be awarded.

Additional support for the above construction of the Act is found in the circumstance that the statute omits entirely to make any provision for any contingency in which the amount ultimately awarded might be less than the amount deposited and received by the former owner according to the Government's valuation, whereas, the statute expressly provides for the case of an award in excess of the amount received by the former landowner.

Under the familiar principle of *expressio unius exclusio alterius*, it seems clear that Congress did not intend that the compensation finally to be received by the landowner, when his property was taken in advance, should ever be less than the amount of the deposit.

The deposit in Court being "to the use" of the persons entitled thereto, and interest on said sum being thereafter denied to the landowner, irrespective

of the amount of the final award, the logical and valid interpretation of the Act is that the amount of the deposit in Court, being the Government's valuation of the land at the time of taking, is intended to be a contemporaneous and unconditional payment in that sum on account of just compensation for the land, the same to vest in the landowner as his property at the time when the title vests in the United States.

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated, Redding, California,

May 18, 1942.

FRANCIS CARR,

Attorney for Respondents.

J. OSCAR GOLDSTEIN,

BURTON J. GOLDSTEIN,

R. P. STIMMEL,

CARR & KENNEDY,

Of Counsel.

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No. 78

UNITED STATES OF AMERICA..

Petitioner,

VS.

VICTOR N. MILLER, also known as Vic Miller;
JOHN J. HUMPHREY, also known as John J.
Humphrey, Sr., also known as J. M. Hum-
phrey; CHARLES J. McCONNELL, also known
as Chas. J. McConnell; ELMER JOHNSON and
HILMA JOHNSON (his wife); DAVID WILSON
AGNEW, ALBERT ROUGE and FLORENCE VAN
SANTEN,

Respondents.

BRIEF FOR RESPONDENTS.

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Attorney for Respondents.

J. OSCAR GOLDSTEIN,
Chicago, California.

R. P. STIMMEL,
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Subject Index

	Page
Opinion of the Court Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	5
The Specifications of Error in the Circuit Court of Appeals	13
Summary of Argument	16
Argument	20
<p>I. The measure of compensation for property condemned by the Government for a public improvement is the value at the time of taking; to exclude from such compensation any increase in value due to the announcement of the project would result in reducing the award to an amount less than the just compensation guaranteed by the Fifth Amendment as settled by the decisions of the Supreme Court of the United States.</p>	
	20
<p>II. The decision of the Court in the case of Shoemaker v. United States, 147 U. S. 282, is not authority for the contention of petitioner that the proper measure of compensation to be paid to the landowners in this case does not include the increase in value, if any, after August 26, 1937, due to the announcement of the Central Valley Project, nor authority for the mode of procedure which the District Court required in this case in respect to proof of value and damages.</p>	
	25
<p>III. General benefits are not a proper offset in fixing the damages to which the landowner is entitled when his property is taken in eminent domain; and the matter of any special or direct benefits in cases of this character is covered by statute.</p>	
	28
<p>IV. The District Court erred in failing to follow the state practice in the trial of this cause.</p>	
	29

V. The entry of judgment in the District Court in favor of the Government for the recovery of the sum of \$650 each from the respondents McConnell, Miller, and Humphrey was unauthorized, (1) the court being without jurisdiction to make said award and (2) there being no authority under the statute for the recapture of said moneys by the Government.....	32
VI. The errors of the District Court in its rulings and charge to the jury were prejudicial, and justified the reversal of the judgment by the Circuit Court of Appeals	37
Appendix	i-x

Table of Authorities Cited

Cases	Pages
Baar v. Smith, 201 Cal. 87, 255 P. 827.....	33
Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270.....	28
Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083.....	31
Brett v. United States, 86 F. (2d) 305.....	20
Brooks-Seanolon Corp. v. United States, 265 U. S. 108.....	21
Buttrick v. Pacific Elec. Ry. Co., 86 C. A. 136, 260 Pac. 588	31
Byars v. United States, 273 U. S. 28, 71 L. ed. 520.....	23
Central Pacific R. Co. v. Pearson, 34 Cal. 247.....	11
Cole v. Ralph, 252 U. S. 286, 64 L. ed. 567, 40 S. Ct. 321...	13
Columbia P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405.....	37
Danforth v. United States, 308 U. S. 271, 84 L. ed. 240....	20, 25
Garfield v. United States, etc., 211 U. S. 249, 53 L. ed. 168...	32, 33
Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142.....	21
Kelley v. Benton, 179 F. 466.....	33
Los Angeles, City of, v. Hughes, 202 Cal. 731.....	11
Los Angeles v. Marblehead L.-Co., 95 C. A. 602, 273 Pac. 131	31
Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622.....	23, 24
Murray v. United States, 130 F. (2d) 442.....	22, 25
Olson v. United States, 292 U. S. 246, 78 L. ed. 1236.....	20, 23
Osage Oil etc. Co. v. Continental Oil Co., 34 F. (2d) 585...	33
Phelps v. United States, 274 U. S. 341, 71 L. ed. 1083.....	21
Reclamation Dist. v. Inglin, 31 C. A. 495.....	11
Russian Volunteer Fleet v. United States, 282 U. S. 481, 51 S. Ct. 229, 75 L. ed. 473.....	21
Ryan v. Bindley, 1 Wall. 66, 17 L. ed. 559.....	31
Sacramento etc. R. Co. v. Heilbron, 156 Cal. 408.....	20, 30
Shoemaker Case, 147 U. S. 482, 13 S. Ct. 361, 37 L. ed. 170	3, 14, 17, 21, 22, 24, 25, 26, 27

	Pages
Spring Valley W. W. v. Drinkhouse, 92 Cal. 528.....	11
Standard Oil Co. v. Missouri, 224 U. S. 270, 56 L. ed. 760..	32
Tilden v. United States, 10 F. Supp. 377.....	21
United States v. 266.25 Acres of Land, 43 F. Supp. 633....	37
United States v. Alcorn, 80 Fed. (2d) 487.....	18, 25, 29
United States v. Certain Lands, 39 F. Supp. 91.....	31, 37
United States v. Certain Parcels of Land, 46 F. Supp. 441..	31
United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 566	20, 27, 28
United States v. Goldstein, 271 Fed. 838.....	32
United States v. Klamath etc. Indians, 304 U. S. 119, 82 L. ed. 1219	21
United States v. New River Collieries Co., 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565.....	20, 22, 23
United States v. Tract of Land, 72 F. (2d) 170.....	31
Wright v. Bales, 2 Black 535, 17 L. ed. 264.....	31

Codes and Statutes

California Code of Civil Procedure, Sec. 1249.....	20, 30
Declaration of Taking Act, 46 Stat. 1421, U. S. C. A. Title 40, Sec. 258a	8
United States Constitution, Fifth Amendment.....	16, 19, 20, 21, 22, 24, 32, 34, 35, 36
United States Constitution, Fourteenth Amendment.....	16
U. S. C. A. Title 33, Sec. 595.....	2, 3, 18, 29, 30
U. S. C. A. Title 40, Sec. 258.....	2
U. S. C. A. Title 40, Sec. 258a, 46 Stat. 1421-1422.....	2, 5, 34

Texts

18 Am. Jur. 944.....	28
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 78

UNITED STATES OF AMERICA,

Petitioner,

vs.

VICTOR N. MILLER, also known as Vic Miller;
JOHN J. HUMPHREY, also known as John J.
Humphrey, Sr., also known as J. M. Hum-
phrey; CHARLES J. McCONNELL, also known
as Chas. J. McConnell; ELMER JOHNSON and
HELMIA JOHNSON (his wife); DAVID WILSON
AGNEW, ALBERT ROUGE and FLORENCE VAN
SANTEN,

Respondents.

BRIEF FOR RESPONDENTS.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported
in 125 F. (2d) 75. In the District Court no opinion was
filed.

JURISDICTION.

In the Circuit Court of Appeals judgment was entered January 22, 1942, reversing the judgment of the District Court. A writ of certiorari was granted herein June 1, 1942 (R. 478), upon the application of the United States.

STATUTES INVOLVED.

- U. S. C. A. Title 40, Sec. 258a, 46 Stat. 1421-1422;
printed in the appendix, infra;
- U. S. C. A. Title 40, Sec. 258;
- U. S. C. A. Title 33, Sec. 595.

QUESTIONS PRESENTED.

The statement of questions presented that is found in petitioner's brief does not reflect all the features that enter into a consideration of the merits of the judgment of the court below, and we believe it is fair to break down the questions presented as follows:

- (1) Whether, in cases where property is taken by the Federal Government for a public improvement in eminent domain, the standard of the just compensation that must be paid to the owners by the Government is to be measured by a different standard from that which governs the taking of private property for public use in eminent domain by other condemnors, by excluding any increase in value due to the announcement of the federal project; or,
- (2) Did the Circuit Court of Appeals correctly decide that the respondent landowners should receive as com-

compensation for the lands taken the full market value of those lands as of the date of taking?

(3) Whether, assuming the *Shoemaker* case may be construed as petitioner contends, said decision has any proper application to the Central Valley Project which was not originally announced by the Government but was first undertaken and publicized by the State of California and authorized by the people of that State in a general election and there is no showing that any increase in the value of property was attributable to the Act of Congress of August 26, 1937?

(4) Whether, assuming that any increase in value due to the announcement of a public project for which land is later condemned by the Government is to be excluded in fixing the compensation to be paid to the owners, the mode of procedure enforced by the District Court in this case at the instance of petitioner was the proper mode of ascertaining and fixing the amount of such compensation, absent any evidence that such an increase in value had occurred, or any proof from which the amount of the supposed increase could be ascertained?

(5) Whether the general benefits accruing to a community from the announcement of a public improvement should be charged against the individual landowner in fixing the damages recoverable in eminent domain, or does not the Act of Congress (U. S. C. A. Title 33, Sec. 595) govern the mode and measure of any offset for benefits that is to be charged against the damages recoverable by landowners in proceedings such as this, instituted by the Government to condemn property for the improvement of rivers, etc.?

(6) Whether the Government was entitled to recapture and recover by summary judgment the amounts, over and above the jury awards, that had been deposited in the court with the declaration of taking when title to respondents' lands was taken, and had been paid to respondents Miller, Humphrey and McConnell, under sanction of statute, by order of the District Court?

(7) Did the Circuit Court of Appeals correctly decide that the judgment of the District Court should be reversed?

(8) Did the District Court err in ruling that witnesses testifying as to value should exclude from consideration any increase in value due to the Central Valley Project after August 26, 1937?

(9) Did not the District Court err in ruling that witnesses testifying as to value should exclude from consideration any increase in value due to the Central Valley Project after August 26, 1937, when no evidence was produced at the trial showing that any such increase in value had occurred?

(10) Did the District Court err in charging the jury that in fixing the compensation to be awarded to respondents, any increase in value after August 26, 1937, attributable to the project should not be considered?

(11) Did not the District Court err in charging the jury that in fixing the compensation to be awarded to respondents, any increase in value after August 26, 1937, attributable to the project should not be considered when there was no evidence before the jury showing the amount of any such increase, or that any such increase had actually occurred?

(12) Did the District Court err in failing to conform to the state practice and modes of procedure and proof as applied to the trial and determination of like causes in the State of California?

STATEMENT.

This action was filed by the Government, petitioner here, upon application of the Secretary of the Interior, to condemn and acquire title in fee simple to several parcels of land for a right of way for the relocation of the main line of the Central Pacific Railroad between Redding and Delta, in Shasta County, California. Such relocation of the railroad was an essential feature of the Central Valley Project, originally undertaken by the State of California, and subsequently authorized by the Congress as a federal reclamation project, due to the fact that the reservoir to be impounded by the Shasta Dam of said project would flood a part of the existing right of way of the railroad.

The several Acts of Congress leading to the authorization and construction of said project are cited in the brief for the United States, and are epitomized in the marginal notes which accompany the published reports of the decision of the Circuit Court of Appeals (125 F. (2d) 75), so it seems quite unnecessary to repeat them here.

The Government filed its amended complaint in the District Court on December 14, 1938, and on the same date a declaration of taking in accordance with the Act of Congress (U. S. C. A. Title 40, Section 258a) was filed by the Acting Secretary of the Interior, and a judgment upon said declaration of taking was made and entered in the

District Court. (R. 23-34.) By said judgment on declaration of taking it was decreed that the title to the lands sought to be condemned, in fee simple absolute, was vested in the United States of America and was condemned and taken for the use of the United States. (R. 36.)

Following the filing of said declaration of taking and the entry of said judgment based thereon, petitioner took possession of the properties in question, and commenced the work of construction for said line of railroad, making cuts and fills, and erecting an underpass which entirely changed the configuration of the land before the trial, and before it was viewed by the jury.

There was some testimony that in March, 1936, the probable center line of the relocated railroad was marked on the ground by stakes (R. 169), but it was also shown that several survey lines were later run for the proposed railroad (R. 177) and the evidence does not show its exact location was finally fixed until this action was filed. The witness Mellin who gave this testimony was the chief Right-of-Way Agent and engineer for the Government at the time of the trial, but on cross-examination it was developed that his employment with the U. S. Bureau of Reclamation commenced on April 1, 1936 (R. 171), prior to which time he was employed on the Central Valley Project by the State of California (R. 171-173), and the preliminary survey work in connection with the project was done for the state.

Originally the action was brought for the condemnation of seven (7) separate parcels of land held in seven (7) different ownerships. Before the trial of the action settlements of compensation were made with the owners of

parcel No. 2 and parcel No. 3 of the lands condemned, and no appeal was taken from the judgment in respect to parcel No. 5. Thus, there are four parcels of the lands described in the amended complaint which are involved in this proceeding.

Answers were filed by the several respondents (R. 39-68) raising issues as to the value of the lands taken and the severance damages suffered by respondents.

Respondents' lands were situate within a business and residential district colloquially known as "Boomtown", which had been settled and developed before the amended complaint and declaration of taking in this action was filed. It is located on the main thoroughfare to and from the site of Shasta Dam, about four miles distant.¹

¹Following is a brief summary of the parcels of land involved on this appeal from the judgment:

Parcel No. 1. This parcel comprises 3.17 acres (R. 7-10) and is owned by the following appellants respectively, as follows: Miller and Humphrey (two-thirds interest) 3.11 acres; Albert Rouge .047 acre; Florence Van Santen .0125 acre. The entire parcel, 3.17 acres, was a portion of a larger tract consisting of approximately 520 acres, as alleged in the amended complaint (R. p. 9); the tract of 3.11 acres had been subdivided.

Parcel No. 4. This tract consisted of 4.81 acres and is owned by appellants Elmer Johnson and Hilma Johnson. It was a part of a larger tract containing approximately 40 acres, as alleged in the amended complaint (R. 13), and the testimony showed that said lands, which Johnson acquired in June, 1937, were adaptable for subdivision and residence purposes. Said respondents claimed a value of \$600.00 per acre for the land taken and \$5000.00 severance damages.

Parcel No. 6. This parcel is owned by appellant Agnew, and consists of a portion of three lots upon which said appellant had erected valuable improvements. He purchased the property in June of 1938, at which time the general information was that the proposed right of way for the relocation of the railroad would be some distance from said lots. Previous to purchasing said lots Agnew had no interest in the area known as Boomtown. It was shown at the trial that shortly before the amended complaint

Prior to trial, upon application of the respondents Miller, Humphrey and McConnell, as owners of parcel No. 7 (R. 69), the District Court made an order (R. 72), authorizing the payment to each of them of \$850.00, one-third of the amount deposited in court with the declaration of taking for the "use and benefit" of the owners of said tract. (R. 33.) Said application and order were authorized by the Declaration of Taking Act, 46 Stat. 1421, U. S. C. A. Title 40, Sec. 258a.

The cause came on for trial in the District Court at Sacramento, California, on January 20, 1940, upon the issues as to the value of the lands taken and the amount of severance damages suffered by the several respondents.

In the District Court petitioner contended that in the determination of the compensation to which respondents

herein was filed the Government increased the width of the proposed right of way fifty (50) feet thus bringing the railroad fifty feet closer to the Agnew property and so close to his buildings as to interfere with the practicable use of same. Severance damages in the sum of \$15,000.00 were claimed by this respondent, the same being specially pleaded in his answer. (R. 55-6.)

Parcel No. 7. This tract of land is owned by appellants Charles J. McConnell, Victor N. Miller and John J. Humphrey. It comprises 10.61 acres, and was a part of a larger tract of land described in the amended complaint (R. 20) consisting of approximately 113 acres. A large portion of said 10.61 acres was situated within the subdivision known as Boomtown Unit No. 4, and was suitable for lots for business and residence purposes. The damage by severance was palpably substantial. The property had a frontage on the main business thoroughfare leading to Shasta Dam known as "Grand Coulee Boulevard" and adjacent to it were many of the lots in said subdivision.

This was the parcel of land for which the Government deposited \$2550.00 with the declaration of taking, and for which the jury awarded only \$600.00, i.e., \$500.00 for the land taken and \$100.00 for severance damages. In their several answers said respondents alleged that the value of the land taken at the date of taking was \$25,000.00; and that they suffered severance damage to the amount of \$15,000.00.

were entitled, the value of their respective lands, and the severance damages suffered through the taking thereof, were to be ascertained and fixed by the jury according to the value on the date of taking, excluding therefrom any increase or increment arising from the Central Valley Project from and after August 26, 1937. Illustrative arguments of counsel for the Government in the District Court and the form of testimony that was allowed are shown in the appendix, *infra*.

This position on the part of petitioner was sustained and followed by the district judge in his rulings on evidence and in his charge to the jury. Exceptions to these rulings were reserved.

As a matter of fact, the trial court frequently sustained objections to valuation testimony made by counsel for the Government, when such objections were based upon the ground that any increase in value due to the Central Valley Project, no matter when it arose, was not excluded irrespective of whether such increase in value arose before or after August 26, 1937. (R. 299, 323, 337, 342, 351-2, 353.)

As a result of the rulings of the District Court, respondents were precluded from introducing evidence as to the value of their several parcels of land at the date of taking, viz.: December 14, 1938, or evidence as to the damage to the portions of their land not taken, as of said date; and the Government, over respondents' objections, was permitted to introduce valuation testimony from which the witnesses excluded "any increase or increment due to the Central Valley Project from and after August 26, 1937". (R. 367-369, 406-407.) Also, the court charged the jury that in fixing the compensation to be awarded to respond-

ents it should not consider any increase in the value of the lands which may have occurred after August 26, 1937, that was attributable to the announcement of plans for or on the construction of the project. (R. 428-29.)

There was no evidence introduced at the trial which showed that there had been any increase in the market value of respondents' lands due to the Central Valley Project after August 26, 1937; and the amount of such increase, if any had occurred, was a matter of conjecture, which witnesses and jurors alike were required to imagine and appraise, without any basis in the testimony, under the rulings and instructions of the trial court.

By the rulings of the District Court, made at the instance of petitioner, the respondents were required to submit their cause and have the compensation for their respective lands determined without any proof going before the jury to show the value *at the date of taking*. It is fair to say that actually there was no trial of the real issues in the case, tendered by the pleadings, viz.: the value of each of the parcels of land condemned on December 14, 1938, and the damages, if any, as of December 14, 1938, to the remaining portions of the lands of appellants by reason of the taking.

An incorrect and misleading statement concerning evidence offered by respondents at the trial is found in petitioner's brief, page 6, where it is stated:

"At the trial respondents sought to introduce evidence of sales of land prior to December 14, 1938, in the vicinity of the land in suit (R. 231)."

Manifestly counsel for petitioner have misinterpreted a question² propounded to the witness Humphrey, respondent, and have misjudged our purpose in asking the question. It was intended merely to develop the qualifications of the witness to give opinion evidence as to values in the vicinity, not to show sales of land; for such testimony would not be competent. According to the long-established rule in California, evidence of sales of other lands is not admissible as evidence in chief in the trial of eminent domain cases, but only on cross-examination for the purpose of testing the witness' knowledge and the value of his opinion. (*Central Pacific R. Co. v. Pearson*, 34 Cal. 247; *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 528; *Reclamation Dist. v. Inglin*, 31 C. A. 495; *City of Los Angeles v. Hughes*, 202 Cal. 731.)

There was no intention on the part of respondents or their counsel to breach or evade said rule in the trial of this cause.

The existence of said rule is overlooked, also, in the later comment made in the same paragraph of petitioner's brief that "Respondents did not offer any evidence concerning sales in the vicinity made before August 26, 1937". Such proof being precluded by the rule, its absence is not to be regarded as an omission of any requirement of the case for respondents.

²The Question:

"Q. Now, then, did you yourself make sales of parcels of real estate—answer this Yes or No—in that vicinity?

A. Yes, in—

The Court. Fix the time.

Mr. Goldstein. Q. Prior to December 14, 1938." (R. 231.)

By the verdict of the jury absurdly low awards of compensation and damages were made to the respondents.³ The verdict was returned and filed on February 10, 1940 (R. 112), but the judgment of the Court, prepared by counsel for the Government, was not entered until May 15, 1940. (R. 126.)

By the verdict of the jury the respondents Miller, Humphrey and McConnell were awarded \$500.00 for their land (Parcel No. 7) and \$100.00 severance damages. By its judgment the District Court, without notice to said respondents or any proceeding to vacate the order it had previously made directing the payment to said respondents of the \$2550.00 deposited with the declaration of taking, summarily entered judgment against each of said respondents for \$650.00. (R. 124-125.)

Following the entry of judgment motions to modify, amend, and/or correct the judgment by vacating, annulling and deleting said awards in favor of the Government were made by said appellants McConnell, Miller, and Humphrey, and said motions were denied. (R. 126-130.)

The appeal to the Circuit Court of Appeals was taken by notice of appeal filed in the District Court in accordance with the present rule. (R. 133.)

In compliance with the rules, the appellants served and filed in the District Court their statement of points on

	Parcel	Land Taken	Severance
Rouge	1	\$ 50.00	\$ 00.00
Miller, et al.	1	165.00	75.00
Van Santen	1	10.00	00.00
Johnson	4	125.00	120.00
Agnew	6	15.00	00.00
McConnell, et al.	7	500.00	100.00

appeal (R. 136) and their designation of the contents of the record on appeal. (R. 143.) Thereafter, upon the filing of the record in the Circuit Court of Appeals, appellants filed with the clerk a statement of points on appeal and their designation of the parts of the record necessary for the consideration thereof. (R. 446.)

THE SPECIFICATIONS OF ERROR IN THE CIRCUIT COURT OF APPEALS.

In the opening brief filed by respondents, appellants in the court below, in the Circuit Court of Appeals, they specified with careful detail the rulings and acts of the District Court that were assigned as error. We are setting forth these specifications of error in the appendix, *infra*, deleting, as far as possible, repetition and unnecessary matter.

These specifications of error are repeated here, for, as we understand the rule, it is open to this court, on certiorari to review a judgment of a Circuit Court of Appeals which reversed a judgment below and ordered a new trial, to consider grounds of appeal not considered by that court for reversing the judgment, and proceed to a complete decision. (*Cole v. Ralph*, 252 U. S. 286, 64 L. ed. 567, 40 S. Ct. 321.)

Questions of evidence and procedure, as well as questions of substantive law, were presented to the Circuit Court of Appeals by said specifications of error.

In support of their appeal to said court the respondents contended:

(1) That they were entitled to recover compensation in this proceeding according to the market value of their several properties at the date of taking, i.e., December 14, 1938;

(2) That if any benefits arising from the project were chargeable against the compensation to be awarded appellants, the same should have been measured and determined in accordance with the Act of Congress expressly relating to such cases;

(3) That no special or direct benefit to the lands of the appellants, within the meaning of said statute, was shown by the proof at the trial, and respondents were entitled to compensation according to the value at the time of taking without deduction, direct or indirect, for benefits arising from the project;

(4) That the decision of this court in the *Shoemaker* case was not authority for the limitations upon the proof of value and damages imposed by the District Court in its rulings on evidence in this case, nor authority for giving to the jury the instructions excepted to;

(5) That the District Court erred in failing to follow and apply the established practice and mode of procedure in California for the determination of the just compensation that should be paid to respondents for their properties;

(6) That the errors of the District Court in its rulings on evidence and its charge to the jury were prejudicial to respondents, as reflected in the ridiculous verdict of the jury;

(7) That as a result of the rulings of the District Court which excluded proof of the value of respondents' lands at the date of taking, there was no valid evidence in the record to sustain the verdict or the

judgment of the court as constituting a just decision as to the amount of compensation to which respondents were entitled;

(8) That in entering judgment upon the verdict the court below erred in awarding judgment to the Government for the recovery of the sum of \$650.00, each, from the appellants McConnell, Miller and Humphrey, and said judgment should be annulled;

(9) That as a result of the errors of the District Court and the entry of judgment in accordance with the verdict of the jury, the respondents:

(1) Were deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States;

(2) Were deprived of their respective properties without due process of law in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States.

The Circuit Court of Appeals, Judge Garrecht dissenting in part, held that respondents should receive as compensation for the lands taken the full market value of such lands at the date of taking (R. 475); that the District Court was without jurisdiction to award judgment to the Government against respondents Miller, Humphrey and McConnell for the recovery of the amounts, in excess of the verdict, which had been paid to them under order of the court, as authorized by the Declaration of Taking Act (R. 468); and the cause was remanded to the trial court for further proceedings consistent with the opinion.

SUMMARY OF ARGUMENT.**I.**

To exclude from the compensation for lands condemned for public use any increase in the value of said lands resulting from the announcement or authorization of the public improvement, for which the lands are later taken, deprives the property owner of the compensation which this court as uniformly held is guaranteed to him by the Fifth Amendment. The decisions interpreting said provision of the Constitution in cases where property has been taken for public use by the Federal Government are uniform in holding that value at the time of taking is the measure of just compensation; and this court has frequently defined such compensation as being the "full equivalent of the value of the property at the time of taking paid contemporaneously with the taking".

If the contention of petitioner is upheld, that any increase in the value of the property resulting from the announcement of the project for which it is taken should be subtracted in fixing the compensation to be paid to the owner by the Government, the result will be that in cases where property is taken by the Federal Government in eminent domain "just compensation" will have a different meaning and be something less than the "just compensation" that must be paid by other condemnors for property that is taken for public use; whereas, up to the present time, the test and measure of just compensation has been the same in all cases, whether arising under the Fifth Amendment or the Fourteenth Amendment.

To thus modify the long accepted interpretation of the Fifth Amendment will be to relax one of the essential safe-

guards of the Bill of Rights against the encroachment of federal power.

No passing considerations of public policy such as those mentioned in petitioner's brief warrant such a departure from an established principle of government.

II.

No sanction of the mode of procedure that was prescribed by the District Court to govern proof of value and severance damages, and no sanction for the rulings of said court to which respondents excepted, is to be found in the decision of this court in the *Shoemaker* case, 147 U. S. 482, 13 S. Ct. 361, 37 L. ed. 170. That express authority for said rulings of the District Court is not to be found in said decision, is apparently recognized by the counsel for petitioner, for their claim appears to be that said rulings "follow from" said decision.

Granting, for the sake of argument, that petitioner has fairly construed the decision in the *Shoemaker* case as applied to the facts of that case, nevertheless there is no sound basis for concluding from said decision that the court intended to give a new interpretation to the phrase "just compensation", or to modify its settled definition, i.e., the full equivalent of value at the time of taking. Nor has the decision since been construed by this court as having that effect.

III.

To require the exclusion of any increase in value resulting from the announcement of the project in fixing just compensation for the land that is later taken for said project is equivalent to allowing an offset for general

benefits, common to the community, against the damages suffered by the landowner by such taking. It is now the general rule that such benefits, as distinguished from special benefits, are not properly an offset against the compensation for the land taken or the damages to the remaining land.

In this case we have the additional factor that the Congress has established by statute the procedure for determining what deduction shall be made for any special or direct benefits to the remaining land in condemnation cases such as this (U. S. C. A. Title 33, Sec. 595); and said statute has been construed as holding that a general benefit, i.e., the increase in value due to the proximity of a project does not fall within the class of benefits that are to be taken into account in fixing damages. (*United States v. Alcorn*, 80 Fed. (2d) 487)

IV.

In the trial of this cause the District Court did not conform to the state practice in California, as the federal statute governing condemnation proceedings provides, particularly in dealing with the matter of benefits and the admission and exclusion of evidence pertaining to compensation and damages.

V.

The award of judgment against the respondents Miller, Humphrey and McConnell, for the sum of \$650.00 each, was an unauthorized exercise of judicial power. It was done without notice, process, or a hearing as to the right of petitioner to recapture moneys that had legally and

regularly been paid to said respondents in pursuance of the statute and an order of the District Court. No authority for such a judgment is conferred by the statute, and the award lacks the requirements of due process. Due process of law is an essential of jurisdiction and the Circuit Court of Appeals correctly held that the District Court was without jurisdiction to enter such judgment.

Aside from the element of lack of process, a proper interpretation of the statute in the light of the Fifth Amendment warrants the conclusion that under the Declaration of Taking Act the property owner is entitled to receive and retain the sum paid to him out of the deposit that is made in the registry of the court. The statute provides that such payment is "for or on account of" the just compensation, and provision is made in the case where the final award is greater than the amount received from the deposit, but there is no provision for the recapture of the money where the jury awards a sum less than the amount that has been paid. *Expressio unius exclusio alterius*. The unfavorable position of the landowner that would result from the interpretation urged by petitioner would not conform with the Fifth Amendment.

VI.

The numerous rulings of the District Court on the admission and exclusion of evidence, to which exception was taken, as well as the instructions to the jury based on the same theory, were unquestionably prejudicial. While the merit of these asserted errors is involved in the consideration we have already given to the questions of substantive law, it seems appropriate that they should be

noted in this summation. The respondents were required by the court to frame their case according to said rulings,⁴ and it is manifest, we believe, that[®] they were violative of settled rules of evidence, and that by the instructions excepted to and said rulings the respondents were deprived of a fair trial.

ARGUMENT.

I.

(a) It has long been the settled interpretation of the Fifth Amendment that value at the time of taking is the measure of the compensation to which the landowner is entitled when property is taken by the Federal Government in eminent domain.

Danforth v. United States, 308 U. S. 271, 84 L. ed. 240;

United States v. Chandler-Dunbar Co., 229 U. S. 53, 57 L. ed. 566;

Olson v. United States, 292 U. S. 246, 78 L. ed. 1236;

United States v. New River Collieries Co., 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565;

Brett v. United States, 86 F. (2d) 305.

Such is the rule in California:

Code of Civil Procedure of California, Sec. 1249;

Sacramento etc. R. Co. v. Heilbron, 156 Cal. 408.

⁴After ruling that the objection of counsel for the government to questions which did not eliminate increase in value due to the project should be sustained, the District Court required that valuation questions conform to the theory of said objection, viz., "The Court: You left out the Central Valley project, enhancement of the value by virtue of the Central Valley project. You left that out entirely. Include that * * *" (R. 242.)

In cases of inverse condemnation the property owner is entitled to compensation fixed by the same rule (*Phelps v. United States*, 274 U. S. 341, 71 L. ed. 1083; *United States v. Klamath etc. Indians*, 304 U. S. 119, 82 L. ed. 1219; *Jacobs v. United States*, 290 U. S. 13, 78 L. ed. 142; *Tilden v. United States*, 10 F. Supp. 377); and this court has repeatedly defined such compensation as being the "full equivalent" of value at the time of taking paid contemporaneously with the taking. (*Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Jacobs v. United States*, 290 U. S. 13; *Phelps v. United States*, 274 U. S. 341; *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 51 S. Ct. 229, 75 L. ed. 473.)

All of the foregoing decisions of the Supreme Court have been rendered since the decision in the case of *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, and yet in none of said cases has said *Shoemaker* case been cited or construed as supporting the contentions advanced by petitioner, and applied in this case by the District Court, in respect to the measure of compensation or the proof of value and damages that is admissible in actions where land is condemned for a federal project.

It is clear that if, as the present rule requires, the full equivalent of value at the time of taking is the proper standard of compensation, the proposal to exclude the increase in value due to the announcement of the project when the Government seeks to condemn for a public improvement means a reduction in the measure of compensation below the present constitutional guaranty. If the contention of petitioner in this case be accepted, then it must be held that the interpretation of the Fifth Amend-

ment, as settled by the decisions of this court, is to be modified.

It would also mean that the landowner would receive for his property in the case of condemnation by the Federal Government for a public improvement a lower standard of compensation than he would receive when his land was taken in eminent domain by another condemnor.

Neither the decision in the *Shoemaker* case, nor any of the other decisions of this court cited in petitioner's brief, support or warrant the adoption of such a rule, or sustain the rulings of the District Court which were the subject of the appeal in this case.

That the value of property taken by the Government for a public improvement should be determined without regard to any increase or decrease resulting from the Government project is expressly declared to be the rule in the recent case of *Murray v. United States*, 130 F. (2d) 442.

The reasons which are urged by petitioner in support of this effort to modify the long accepted standard of just compensation are rested in large part upon grounds of expediency and public policy, but such considerations do not warrant such a fundamental change in a matter that affects so closely the constitutional safeguards to be found in the Fifth Amendment. This court has held that the rule for which respondents contend applies with all its force, notwithstanding the taking be for war purposes; that war does not suspend the Fifth Amendment. (*United States v. New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565.) The necessities of the Government in time of peace cannot justify the adoption of a rule less favorable to the landowner. In said decision the court said:

"Section 10 of the Lever Act, in obedience to the 5th Amendment, provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 88, 65 L. ed. 516, 520, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." (Opinion 262 U. S. 344, 76 L. ed. 1017.)

This court more than once has declared the principle that constitutional provisions for the security of person and property are to be liberally construed, and that it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. (*Byars v. United States*, 273 U. S. 28, 71 L. ed. 520.) It seems appropriate, as we are concerned with such a fundamental issue, to quote here from the case of *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622, in which the court said:

"In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

To which declaration this court in the *Olson* case added:

"The statement in that opinion that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes."

It is a significant fact that said case of *Monongahela Nav. Co. v. United States* was decided by the same court, with one exception, that decided the *Shoemaker* case, and within three months after that decision was announced; and yet the court in the *Monongahela* case declared and held without qualification that the just compensation guaranteed by the Fifth Amendment "must be a full and perfect equivalent for the property taken". The decisions of this court have ever since been uniform in the enunciation of that rule.

Aside from the fact that the proposition for which petitioner here contends is contrary to the settled rule, it is apparent that it involves an unreasonable and impracticable mode of procedure, and advocates a measure of compensation that is incapable of just ascertainment. It immediately suggests the question: "How is the amount of the increase in value due to the announcement of a project to be ascertained and determined, particularly when a considerable time elapses before a proceeding in eminent domain is instituted?" It is obvious, we believe, that the answer must be that such increase cannot reasonably be appraised or estimated but in each case will be a matter of conjecture. As has been said of general benefits, it is purely conjectural and incapable of estimation. For instance, as we have noted *supra*, there was absolutely no evidence in this case as to the amount of such increase, nor, in fact, any proof that any such increase had occurred, so that the witnesses who were required to consider and exclude that element, in giving the answers permitted, and the jurors who were instructed not to consider it in reaching a verdict, were obliged to deal with something illusive.

To charge against the landowner's compensation the increase in value due to the announcement of the project seems clearly to be contrary to the principle recently declared by this court in the decision in the case of *Danforth v. United States*, supra, in which it is said:

"A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."

Also, in said decision, it is declared:

"The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified or appropriations may fall."

The decision in the *Danforth* case is cited in the decision of the U. S. Court of Appeals for the District of Columbia in the case of *Murray v. United States*, supra, in which that court said:

"And the duty of the jury was to fix the value without regard to any increase or decrease resulting from the government project." (130 F. (2d) p. 444.)

See also:

United States v. Alcorn, supra.

II.

We believe that analysis is unnecessary to show that the decision in the case of *Shoemaker v. United States*, supra, is not authority for the far-reaching proposition that is

urged by the petitioner in this case, on the proper measure of compensation; and certainly it is not authority for the mode of trial adopted by the District Court. It is fair, to say, we believe, that the two instructions that were upheld in that decision must be construed as having application to issues which arose under the particular circumstances of that case.

It will not be deemed that the court intended in such a furtive manner to enunciate such an important modification of existing constitutional law.

Pertinent in the consideration of the *Shoemaker* case is the fact that the Central Valley Project was conceived and first undertaken as a State project, and was given wide publicity through the fact that it was submitted to the people of California at a general election on referendum, in which the legislation was ratified. By the Act of Congress of August 26, 1937, as is stated in petitioner's brief, the project was *reauthorized*, the matter having been the subject of previous action by the Congress subsequent to the aforementioned election in California. Further, it is to be noted that it was the Act of May 9, 1938 (Appendix to the Brief for the United States, pp. 33-34), in which condemnation for the relocation of the railroad and the making of the necessary arrangements with the Central Pacific Railroad was authorized.

There is another feature of the *Shoemaker* case that merits consideration in dealing with its application to the present case, and that is the fact that the commission in that case, as it appears from the decision, was dealing only with the value of lands taken, and the two instructions upon which petitioner rests its arguments here do not

appear to have had any relation to the question of fixing severance damages.

Under the facts shown in the present case, severance damages were an important and substantial issue, involving, according to respondents' witnesses, many thousands of dollars, and yet the District Court, following the argument of counsel for the Government based on the *Shoemaker* case, applied to the proof of damages to the land not taken the same limitation that witnesses were required to follow in giving their testimony as to the value of the land in the railroad right of way.

As regards the instruction in the *Shoemaker* case against receiving evidence of sales of similar property subsequent to the passage of the act authorizing the park, respondents here have never contended that proof of such sales was competent, nor did they offer proof of such sales in the District Court. As noted in the statement of the case, *supra*, a qualifying question as to familiarity with sales was asked of one of the witnesses, but the California*rule was observed, that evidence of sales of other lands in the vicinity is not competent on direct examination. It may properly be said, we believe, that no issue arose in the District Court to which the first instruction dealt with in the *Shoemaker* case applies.

In a later decision this court appears to have defined the interpretation and effect to be given to the decision in the *Shoemaker* case. We refer to the case of *United States v. Chandler-Dunbar Co.*, *supra*, where it is said:

"The value should be fixed as of the date of proceedings, and with reference to the loss the owner sustains, considering the property in its condition and situation

at the time it is taken, and not as enhanced by the purpose for which it was taken. *Kerr v. South Park Comrs.*, 117 U. S. 379, 387, 29 L. ed. 924, 927, 6 Sup. Ct. Rep. 801; *Shoemaker v. United States*, 147 U. S. 282, 304, 305, 37 L. ed. 170, 186, 187, 13 Sup. Ct. Rep. 361." (229 U. S. page 76, 57 L. ed. 1080.)

We do not believe that any useful purpose will be served by extending this brief with a discussion of the other authorities cited in petitioner's brief.

III.

The claim of petitioner that increase in value due to the announcement of the project should be excluded from consideration in fixing the compensation to be paid to the owner is essentially the same as claiming that a deduction or offset should be allowed for general benefits, common to the community. It is now the generally recognized rule that such benefits should not be set off against the damages recoverable in condemnation. The rule is the same in determining the compensation to be paid for the land taken and in fixing the damages to the remaining land. (18 Am. Jur. 944.) A sound basis for the rule is derived from the circumstance that the landowner pays for his share of such benefits through the payment of taxes, and should not be charged again for a benefit which the other landowners enjoy without payment.

Special or direct benefits, on the other hand, may be set off against the value of the land taken or the damages to the remaining land. (*Bauman v. Ross*, 167 U. S. 548, 42 L. ed. 270.) The Circuit Court of Appeals, in a similar

condemnation suit arising out of the construction of the Bonnaville power project, has expressly held that increase in the value of the defendants' land, due to its proximity to the project, is not a special or direct benefit to the land not taken. (*United States v. Alcorn*, supra.) The opinion in that case discloses that the Government was advancing the same claim there as it is urging here concerning increase in value.

This matter of special or direct benefits is now covered by an Act of Congress,⁵ that is cited in said decision of the Circuit Court of Appeals in *United States v. Alcorn*, and that decision, we believe, is authority for holding that only special and direct benefits are an offset in the cases covered by that particular statute, which would embrace this project.

IV.

In the court below one of the grounds of appeal urged by respondents was their claim that the District Court had failed to observe and apply the California practice and mode of procedure in the trial of this cause. This

⁵U. S. C. A. Title 33, Sec. 595: "*Consideration of Benefits in Assessing Compensation.* In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals or waterways of the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken, or for any injury to the part not taken, shall take into consideration by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement and shall render their award or verdict accordingly."

assignment of error was not discussed in the decision of the Circuit Court of Appeals, for in most aspects no necessity to consider it remained after the decision of the court on the main question in the case.

One of the rules in California that was invoked by respondents under said exception was the statutory rule as to the time when the value of property taken in eminent domain shall be fixed. The Code of Civil Procedure of California, Section 1249, expressly provides that value at the time of taking is the measure of compensation. See also, *Sacramento etc. R. Co. v. Heilbron*, 156 Cal. 408. This rule, as we have seen, was in harmony with the Constitution of the United States.

In cases in eminent domain the conformity act relates to practice, pleadings, forms and modes of proceeding.*

Excluding the statutes pertaining to the District of Columbia there is no federal statute which requires or provides a standard of compensation or a mode for the ascertainment of damages different from the law of California.

(6) The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding.

The proposition has long been settled that the laws of the State which the federal courts are found to follow under the judiciary act and the conformity act extend to, and include rules of evidence prescribed by the statutes of the State and the decisions of the state court. (*Wright v. Bales*, 2 Black 535, 17 L. ed. 264; *Ryan v. Bindley*, 1 Wall. 66, 17 L. ed. 559.)

The practice of the State where the property is situated applies in actions in eminent domain brought by the Government. (*United States v. Certain Lands*, 39 F. Supp. 91; *United States v. Certain Parcels of Land*, 46 F. Supp. 441; *United States v. Tract of Land*, 72 F. (2d) 170.) There was no sanction under the rules of evidence in California for the questions propounded to the valuation witnesses at the direction of the District Court. Such questions, and the testimony elicited, required the assumption of a fact as to which there was no evidence, namely, that there had been an increase in value due to the Central Project after August 26, 1937. In brief, no foundation was laid for such testimony. Also, in giving the instructions to the jury involving the same element of supposed increase in value, the District Court disregarded a rule of procedure and practice in California, namely, that the giving of an instruction which finds no support in the record is improper, and if prejudicial is ground for reversal. (*Buttrick v. Pacific Elec. Ry. Co.*, 86 C. A. 136, 260 Pac. 588.) Viewing the matter of increase in value as really being a question of benefits, the District Court also failed to conform to the California practice, under which there can be no deduction for general benefits. (*Beveridge v. Lewis*, 137 Cal. 619, 70 Pac. 1083; *Los Angeles v. Marblehead L. Co.*, 95 C. A. 602, 273 Pac. 131.)

V.

The entry of judgment by the District Court in favor of petitioner and against respondents Miller, Humphrey and McConnell for the recovery of \$650.00 from each of said respondents was unauthorized and erroneous for two reasons, (1) lack of due process, going to the jurisdiction of the court, and (2) that the recapture of the money that was paid to said land owners according to the provisions of the Declaration of Taking Act, by order of the court, was not intended by said Act; and that in the light of the Fifth Amendment the Act should not be interpreted as authorizing such a recovery.

It is acknowledged that the award was included in the judgment of the District Court, *sua sponte*, without notice, process or a hearing, though the money was lawfully in the possession of said respondents; or, what is more likely, had been spent by them. The District Court had ordered the payment of the money, as the statute authorized, and no proceeding to vacate said order was taken or suggested before the entry of the judgment. Timely objection to the award was made before the District Court, following notice of the entry of judgment. (R. 126-130.)

The summary entry of the judgment awarding recovery of said money to petitioner was without due process of law.

Garfield v. United States, etc., 211 U.S. 249, 53 L. ed.

168;

Standard Oil Co. v. Missouri, 224 U.S. 270, 56 L. ed.

760;

United States v. Goldstein, 271 Fed. 838, 845.

We believe that the language of the court (opinion by Mr. Justice Day) in the *Garfield* case, *supra*, may appropriately be quoted here, viz.:

"In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

The foregoing objection to the judgment goes to the jurisdiction of the court. A decree, in so far as it undertakes to decide issues not made by the pleadings, is *coram non iudice* and void. (*Osage Oil etc. Co. v. Continental Oil Co.*, 34 F. (2d) 585; *Baer v. Smith*, 201 Cal. 87, 99, 255 P. 827; *Kelley v. Benton*, 179 F. 466.)

There is the further question whether the Declaration of Taking Act is to be interpreted as justifying judgment against a land owner for the recovery of the amount, in excess of the jury's verdict, that may previously have been paid to him out of the deposit that must be made in the District Court under the procedure of said Act when title to his land is taken and vests in Government.

It is the contention of the respondents affected by said award that the language of the statute does not sustain

such an interpretation, and that if it were to be given such an interpretation rights assured to property owners by the Fifth Amendment would be denied.

The following provisions of the statute negative any implication that the government is entitled to judgment against a landowner for the return of any part of the money deposited in the registry of the court, and withdrawn by the landowner in pursuance of the act, viz.:

(a) The deposit in the court is made "to the use of the persons entitled thereto";

(b) Upon the filing of the declaration of taking and such deposit in the court, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America;

(c) "Interest shall not be allowed on so much" (of the final award) "as shall have been paid into the court";

(d) "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding";

(e) In case the compensation finally awarded "shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency."

The Act, U.S.C.A., Title 40, Sec. 258a, is printed in the appendix, *infra*.

According to the first paragraph of the Act the Government, in filing the declaration of taking, declares that the

lands "are thereby taken for the use of the United States", and the deposit being made, title to the lands taken vests in the United States. In construing the statute it must be assumed that the words "the use of" were employed in the same sense in both instances in which they appear.

Had the intention been that a landowner must restore any money paid to him from the deposit, assuming such a requirement would be valid under the Fifth Amendment, such a condition would have been definitely expressed and incorporated in the statute, for it cannot properly be supplied by implication in view of the other provisions of the statute.

If serious consideration is given to the provisions of the Act limiting the allowance of interest that may be paid upon the amount that is finally awarded, and denying interest on the sum deposited, and, with the other features of the statute, the legislation is tested by the requirement of the Fifth Amendment that the owner of the property condemned is entitled to the *full equivalent of the value at the time of taking paid contemporaneously with the taking*, we believe that it must be concluded, to sustain the validity of the Act, that the landowner has an absolute right to the amount that is deposited for his land in the registry of the court.

Applying to the situation the established measure of compensation as defined in the decisions of this court, it is apparent that in order to sustain the Act as being constitutional, which is the interpretation to be sought, it must be held that the amount of the deposit is intended to be a *contemporaneous and unconditional payment "for or on*

account of" the just compensation for the land which vests in the landowner as his property absolutely, and upon which accordingly no interest is to be paid, and with the right to such additional or excess amount if any, over and above the said deposit, as may be found to constitute the value on the date of taking, with interest on such additional excess amount from the date of taking to the date of payment.

It is not to be supposed that Congress intended to place the landowner in such a situation as would be presented if the theory of appellee is adopted, which may be summarized briefly as follows:

If you fail to withdraw and use the money deposited in the court and the jury brings in a verdict for said amount or more, you will lose interest on the amount you fail to withdraw and use; if you could not withdraw and use the money, no interest being allowed thereon, your constitutional rights would be invaded, but if you withdraw and use the deposit, so as to compensate for the loss of use of your property, and a lesser amount is finally awarded, then you will be under obligation to pay back a part of the moneys thus withdrawn and used, and if you do not have that amount you will suffer the embarrassment of having a legal obligation which you may be unable to meet; that is to say, for taking your land we offer you a *dilemma*.

Surely the guaranty of the Fifth Amendment is something more definite and secure.

Under a proper interpretation of the Act the respondents Miller, Humphrey and McConnell are entitled to retain the money that was paid to them out of the registry

of the court. (See *United States v. Certain Lands*, 39 F. Supp. 91; *United States v. 266.25 Acres of Land*, 43 F. Supp. 633.)

VI.

The asserted errors of the District Court in the trial of this cause are already quite fully presented in the foregoing argument and no further discussion of the exceptions under that head appears to be warranted. That said errors would tend to prejudice the jury seems manifest. In such a case judgment will be reversed. (*Columbia P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. ed. 405.)

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, Redding, California,

November 6, 1942.

FRANCIS CARR,

Attorney for Respondents.

J. OSCAR GOLDSTEIN,

R. P. STIMMEL,

CARR & KENNEDY,

Of Counsel.

(Appendix Follows.)

Appendix



Appendix

SPECIFICATIONS OF ERROR

Appeal of Victor N. Miller, John J. Humphrey and Charles J. McConnell. (Parcel No. 7.)

1. The court erred in its rulings on the admission and rejection of evidence as follows:

(a) The court erred in sustaining appellee's objections to the testimony of respondent Humphrey as to the fair market value of Parcel 1 of the land condemned on the date of taking, and in rejecting such testimony.

The Question:

"Q. I will ask you to state what was the fair market value of that particular piece of land or that tract of land on December 14, 1938?"

The Objection:

"Mr. Landrum. Just a moment. That is objected to on the ground and for the reason it is incompetent, irrelevant and immaterial, no foundation laid, in the further ground and further reason that it includes within itself any increased value in this property due to the Central Valley Project." (R. 232.)

"Mr. Landrum. My objection to this question—and it is important—goes to its form, in that it doesn't eliminate from the answer any increased value over the value of the property due to the Central Valley Project. If he will ask the value, forgetting—excluding any increase in the value due to the project, I will have no objection, but his question is going right back to the very thing the Supreme Court in the Shoemaker case says he can't do." (R. 233.)

(Exception noted and allowed, R. 240-241.)

(b) The court erred in sustaining appellee's objections to the testimony of the witness Francis E. O'Connor, (valuation expert for appellants) as to the fair market value of Parcel 1 and Parcel 7 of the land condemned on the 14th day of December, 1938, and in rejecting such testimony. The grounds of objection urged by counsel for the Government were stated as follows:

The Question:

"Q. Calling your attention first then to Parcel No. 1 comprising approximately 3.17 acres located in the Rouge Tract, I will ask you to state what in your opinion was the fair market value of that particular tract of land referred to here as Parcel No. 1 on the fourteenth day of December, 1938?"

The Objection:

"Mr. Landrum. Just a moment, that is objected to upon the ground and for the reason that it includes within itself any increase or increment to that property due to the Central Valley Project.

The Court. The objection is sustained." (R. 299.)

The Question:

"Q. What in your opinion—we reserve an exception, your Honor, to the ruling—what in your opinion, Mr. O'Connor, was the reasonable market value of the property described in Parcel No. 7 referred to here as the Kelly Tract, comprising approximately 10.61 acres on the fourteenth day of December, 1938?"

The Objection:

"Mr. Landrum. Same objection, your Honor.

The Court. Same ruling.

Mr. Goldstein: "Take an exception to your Honor's ruling." (R. 300.)

(Exceptions reserved, R. 299-300.)

(c) The court erred in excluding the testimony of Jonathan Tibbets as to the market value of said lands on December 14, 1938. (Objections and exceptions by stipulation, R. 301.)

(2) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, Thomas G. Mapel, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment due to the Central Valley Project from the 26th day of August, 1937. (R. 454.)

Respondents' objection went to lack of qualification for the witness to give valuation testimony, as well as the incompetency of the testimony as to value with the increase in value excluded.

On direct examination, over appellants' objections, the witness gave his valuation testimony in respect to each parcel of land sought to be taken, in response to the questions by Government counsel in which the witness was asked his opinion as to market value, or damages, as of December 14, 1938, leaving out and excluding from consideration any increase or increment due to the Central Valley Project from and after August 26, 1937.

Later, on cross-examination, the witness admitted that in giving his valuation testimony, he eliminated any and all possible increment in value due to the project whether it arose before or after August 26, 1937.

Cross-Examination.

"A. It was necessary to take into consideration that the project would have—would reflect a value in the district by reason of it, you would have to take that into consideration, but the appraisal was made dismissing it.

Q. Completely?

A. *Completely.*

Q. All right. So we will understand this clearly, the appraisal and the figures that you testified to before this jury eliminated completely any consideration or question, whether economic or financial, anything pertaining to the Central Valley Project?

A. That is correct." (R. 387.)

"A. The figure that I expressed is an estimate of the fair market value of the several parcels of land involved in this suit—expressed value—a market value, taking into consideration no increment in value by reason of the project." (R. 388.)

"Q. You went further, didn't you, you eliminated everything from that property in connection with the Central Valley Project from December, 1933, clear on up to August 26, 1937, didn't you?

A. Yes." (R. 393.)

(e) The court erred in admitting into evidence, over the objection of defendants and appellants, the testimony of the witness, F. C. Herrmann, giving his opinions in respect to the fair market value of the respective parcels of land of defendants and appellants taken, and the damage resulting from such taking as of December 14, 1938, excluding from consideration any increase or increment

due to the Central Valley Project from the 26th day of August, 1937. (R. 454.)

The objection of appellants to the testimony of said witness was embraced in a stipulation made by counsel in open court. (R. 406-407.)

Rulings similar to those given above on the part of the defendants Miller, Humphrey and McConnell, in relation to evidence of value offered on the part of defendants Johnson and Agnew, were made by the district court during the trial. (R. 323, 337, 338, 343, 351-353.)

The court erred in its charge to the jury, by giving the following instruction requested by the appellee:

"The government may not be required to pay any increase in the value of the property which it has caused by reason of its contemplated taking of the property by eminent domain proceedings. Any rise in value before the taking should be allowed to the property owners but not any rise caused by the expectation that the government intended to condemn the property.

"As you have already heard, this property is being taken for the so-called Central Valley Project. If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937, such increase or enhancement in value is not to be considered by you. The value you are to fix and award as compensation is the value this land would have had had this project not been announced, planned or constructed on August 26, 1937. It may be that because of this project the use for which the property is suited may have changed. You should consider it only for the use to which it was suited or adapted before that use was changed by the project. The gov-

ernment must not be required to pay for something it has itself made." (R. 428-29.)

Said instruction was Plaintiff's Instruction No. 13. (R. 84.) Objection to same was made by appellants before the district judge on the following grounds:

That the instruction violated the constitutional rights of the defendants under the Constitution of California and the Federal Constitution, and was contrary to law;

That just compensation is value at the time of the taking;

That the giving of said proposed instruction by the court would be prejudicial to the rights of defendants, and a verdict in accordance with such instruction would be unjust.

(Exception reserved and allowed, R. 444-45.)

(i) The court erred in its charge to the jury by giving the following instruction requested by appellee:

"You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which may have occurred from and after that date which you may find was attributable to the announcement of plans for or construction of this project." (R. 429.)

Said instruction was Plaintiff's Instruction No. 13a.

(Exception reserved and allowed, R. 444-45.)

(k) The court erred in its charge to the jury by giving the following instruction requested by the appellee:

"Although the value of the land taken by the government must be estimated on the basis of its value for all purposes including its value as a potential subdivision (if you find that it has a value as such potential subdivision *which was not due to the project itself*), nevertheless you may not take into consideration the price that its owners might have been able to obtain for the land after such subdivision had actually taken place." (R. 429-430.)

(Exception reserved and allowed, R. 444-45.)

Said instruction was Plaintiff's Instruction No. 18. (R. 89.)

(k-2) The court erred in failing to apply and follow the law of California.

(m) The court erred in entering judgment in said cause in accordance with the verdict of the jury.

(n) The evidence is insufficient to justify the verdict of the jury in respect to the damages suffered by said appellants by the taking of their respective parcels of land and said verdict is against law.

(o) The compensation and damages awarded to said appellants by the verdict and judgment herein are ridiculous, inadequate and unjust.

(p) As a result of the errors of the District Court in its rulings upon the admission and rejection of evidence and errors in the charge to the jury, and as a result of the entry of judgment in accordance with the verdict of the jury, said appellants:

(1) Were deprived of the just compensation for their respective properties guaranteed to them under the provisions of the Constitution of the United States and the Constitution of the State of California;

(2) Were deprived of their respective properties without due process of law in violation of their rights, privileges and immunities under the provisions of the Constitution of the United States.

On the part of defendants Miller, Humphrey and McConnell it was further specified that the court erred in awarding judgment against the defendants Miller, Humphrey and McConnell for the sum of \$650 each.

DECLARATION OF TAKING AOT.

Section 1 of the Act of February 26, 1931, 46 Stat. 1421-1422 (U. S. C., title 40, sec. 258 (a)), provides:

That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just

compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942

No. 78

UNITED STATES OF AMERICA,

vs.

Petitioner,

VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER; JOHN
J. HUMPHREY, ALSO KNOWN AS JOHN J. HUMPHREY,
SR., ALSO KNOWN AS J. M. HUMPHREY; CHARLES J.
McCONNELL, ALSO KNOWN AS CHAS. J. McCONNELL;
ELMER JOHNSON AND HILMA JOHNSON (HIS
WIFE); DAVID WILSON AGNEW, ALBERT ROUGE
AND FLORENCE VAN SANTEN,

Respondents.

PETITION FOR REHEARING.

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Of Counsel.

INDEX.

SUBJECT INDEX.

	Page
Petition for rehearing	1
The rulings of the District Court with respect to the production of opinion evidence as to value were erroneous and prejudicial	2
It was prejudicial error for the Trial Court to allow questions to be propounded to the wit- nesses which assumed a fact not shown by the evidence	3
The conclusion that the Government is entitled to recover from the Respondents Miller, Hum- phrey, and McConnell the amounts paid to them in excess of the verdict is predicated upon an interpretation of the Declaration of Taking Act that omits consideration of the Fifth Amendment as it has been uniformly interpreted by this Court	9
Certificate of counsel	12

TABLE OF CASES CITED.

<i>Brooks-Seanlon Corp. v. United States</i> , 265 U. S. 106	10
<i>Buttrick v. Pacific Elec. Ry. Co.</i> , 86 C. A. 136, 260 Pac. 588	8
<i>Columbia & Puget, etc., Co. v. Hawthorne</i> , 144 U. S. 202, 36 L. Ed. 405	6
<i>Fillippon v. Albion Slate Co.</i> , 250 U. S. 76, 63 L. Ed. 853	8
<i>Garrow v. United States</i> , decided November 25, 1942	11
<i>Herten v. Loffler</i> , 212 U. S. 397, 53 L. Ed. 568	5
<i>Jacobs v. United States</i> , 290 U. S. 13	10
<i>McCandless v. United States</i> , 298 U. S. 342, 80 L. Ed. 1205	8
<i>McCrate v. Morgan Packing Co.</i> , 117 F. (2d) 702	8
<i>Phelps v. United States</i> , 274 U. S. 341	10
<i>United States v. 17,280 Acres</i> , 47 F. Supp. 267	11

<i>United States v. Certain Lands, etc., New York</i> , 30 F. Supp. 91	11
<i>United States v. Klamath, etc.</i> , 304 U. S. 119	10
<i>Williams v. Great Southern L. Co.</i> , 277 U. S. 19, 72 L. Ed. 761	6

STATUTES CITED.

Fifth Amendment	2, 9, 10
Section 269 of the Judicial Code, U. S. C. Title 28, § 391, as amended	6

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Respondents.

PETITION FOR REHEARING.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully petition that a rehearing of this cause be granted by the Court in order that further consideration may be given

(1) to the claim of the respondents that the judgment of the District Court should be reversed and a new trial

granted, because of errors in procedure before the trial court which violated established rules of evidence and practice and must be deemed to have prejudiced respondents before the jury;

(2) the claim of respondents Miller, Humphrey and McCConnell that it was error for the court to award judgment against them for the recovery of a portion of the money that was deposited in the registry of the Court under the provisions of the Declaration of Taking Act when the government took absolute title to their land, and was paid to them "*for or on account*" of the compensation to be awarded in this proceeding.

By the decision in this case this Court has announced a general principle of law that is of wide national interest and has settled a question that affects matters of substantial concern to the Government. The rights of the humble citizens who are the respondents in this case should also be a matter of grave concern; and if, as we sincerely believe and urge, they were denied the safeguards of approved rules of evidence and practice in the determination of the compensation to be paid for their lands, and if the judgment, as to some or all of the respondents, deprives them of the compensation assured by the Fifth Amendment, they should be granted a new trial.

I.

The Rulings of the District Court With Respect to the Production of Opinion Evidence as to Value Were Erroneous and Prejudicial.

The doctrine announced by the Court on the substantive question of law in this case, as we understand your Honors' decision, is that the compensation to be recovered by the landowner in cases where property is taken by the Government in eminent domain shall not include any increase

in value after the project is authorized arising out of the likelihood of the taking of his property; or, expressed in another way, shall not include any increase in value due to the expectation that the land will be condemned.¹

Accepting, for the purposes of this petition, the rule that has now been enunciated by this Court, we urge that it must be held upon further consideration that rulings of the District Court with respect to the production of evidence and the procedure allowed in that Court were erroneous and prejudicial, the more so for the reason that the questions addressed to the value witnesses did not conform to the test now established by your Honors' decision in this case.

It Was Prejudicial Error for the Trial Court to Allow Questions to Be Propounded to the Witnesses Which Assumed a Fact Not Shown by the Evidence.

In the opinion of the Court consideration is given to the claim of respondents that the District Court disregarded the California practice with respect to the production of

¹The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

In which category do the lands in question fall? The project, from the date of its final and definite authorization in August, 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August, 1937, because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possibly purchasers from them, as to what the Government would be compelled to pay as compensation."

opinion evidence, but the discussion is confined to the controversy with respect to the proper course of examination of an opinion witness on value and it does not correctly reflect or fully cover the grounds of error that were urged in the brief.² Other assignments of error are not reviewed.

Throughout this appeal the respondents have asserted (Brief for Respondents, p. 31) that questions addressed to witnesses, asking their opinions as to value leaving out "any increase in value after August 26, 1937, due to the Central Valley Project", which questions not only were allowed but in fact required by the District Judge, were improper, in that in such questions *a fact was assumed as to which there was no evidence.*

In the trial of this case no proof was offered, no witness testified, that there was any increase in the value of respondents' lands after August 26, 1937, but the suggestion of such an increase was paraded before the jury, day after day, and all the value witnesses, in giving their answers, were bound to observe an assumption that had no foundation in the proof. Such a flagrant violation of an important rule of practice cannot, we submit, be regarded as being anything but prejudicial. ⁹

² "The respondents urge, further, that the reversal by the Circuit Court of Appeals is justified by the District Court's disregard of the practice of the California courts with respect to the production of opinion evidence as to market value, even though it was right as the elements which must be excluded. They allege that, in California courts, an opinion witness must state his valuation as at the date of taking and the opposing party is at liberty, upon cross examination, to elicit the facts on which the witness relied in arriving at that value. Counsel insist that if the Government was entitled to have the witnesses disregard any increment of value due to the Government's intention to construct the project it could have developed, on cross examination, how far the inclusion of any such element had affected the value stated. We think that probably under California procedure this would have been the better and more appropriate way to develop the basis of the witnesses' opinions. We do not feel, however, that if there was a disregard of the local practice in this aspect the error is substantial or worked injury to the respondents."

The presentation of evidence in such a manner was not only in disregard of local practice, but was in violation of a universal rule governing the production of proof, a rule that has been declared and enforced by this Court.

A witness cannot testify as to values in answer to a question which assumes as a fact what there is no evidence to support.

Harten v. Löffler, 212 U. S. 397, 53 L. Ed. 568.

Further, we now have the situation that the questions which were addressed to the value witnesses did not conform with the rule that this Court, by its decision, has held to be applicable to this case, namely, that in fixing compensation any increment arising from the likelihood that the land would be taken should be excluded.

A comparison of the question that was addressed to value witnesses under the rulings of the District Court and the question that should have been asked under the sanction of your Honors' decision illustrates the variance. Each of the witnesses who gave value testimony at the trial was asked, under stress of the ruling of the District Judge, to give his opinion as to the value of the tract of land concerning which he testified leaving out

"any increase or increment due to the Central Valley Project from and after August 26, 1937."

Disregarding variations of language, we believe we have fairly stated the test and substance of each question.

Under the doctrine and rule that the Court has announced in this case the question should have been so framed as to require the witness to exclude

"any increase in value after August 26, 1937, due to the likelihood that the land would be taken for the Central Valley Project."

The distinction is palpable and substantial. In your Honors' opinion it has been pointed out that all increase in value

due to the Project is not to be denied to the landowner, but such increase as arises from the known fact that the lands probably would be condemned. In the production of evidence this distinction was entirely disregarded.

In no instance during the trial was testimony elicited that conformed to the test which this Court has now set; no witness was asked to give his opinion as to market value, excluding any increment arising from the likelihood the land would be taken. On the other hand the jury returned its verdict after hearing value evidence that was based on another standard, and after listening day after day, to testimony, argument and rulings of the court which implied and suggested that the value testimony that was allowed during the trial was the proper basis of compensation.

The atmosphere of the trial court was charged with the idea that it was increase "due to the Project" that could not be considered, and no one can appropriately conclude that a verdict derived from such an atmosphere was not influenced by what the jurors heard.

Errors in the admission and exclusion of Evidence which directly affect the substantial rights of the parties are not within the operation of § 269 of the Judicial Code, U. S. C, title 28, § 391, as amended, requiring judgment to be given without regard to technical errors which do not affect the substantial rights of the parties.

Williams v. Great Southern L. Co., 277 U. S. 19, 72 L. Ed. 761.

Where incompetent evidence is admitted against the defendant's exception which bore upon one of the principal issues on trial, and which tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed.

Columbia & Puget, etc., Co. v. Hawthorne, 144 U. S. 202, 36 L. Ed. 405.

We earnestly contend, and this is said with all respect for this Court, that it cannot justly be concluded that the record in this case affirmatively shows that the errors of the trial court were harmless.

The misleading effect of the questions addressed to the value witnesses and the prejudicial effect of the testimony elicited was not cured or removed by the instructions to the jury, nor can it logically be assumed that a charge to the jury could purge the record of such a pervasive error.

Moreover, the trial court, in its charge to the jury repeated and accentuated the proposition that increase in value due to the announcement of the project, rather than increase due to the likelihood that the land in suit would be condemned, was the element to be excluded. We quote from the charge to the jury:

"If the announcement of, plans for, or the carrying out of that project has increased or enhanced the value of the lands involved in this case, since or after August 26, 1937; such increase or enhancement in value is not to be considered by you" (R. 428).

"You are instructed that this acquisition or project was authorized by an Act of the Congress of the United States approved August 26, 1937, and I instruct you that you may not consider and include in your verdict any increase in value of these lands which (724) may have occurred from and after that date which you may find was attributable to the announcement of plans for or construction of this project" (R. 429).

It is true that the Court also instructed the jurors that a property owner was not allowed any rise caused by the expectation that the government intended to take the property, but this did not accord with the evidence they had been hearing; and the result in the jurors minds could only have been confusion; in weighing the effect of the errors no one can say that the jurors did not follow the

same standard that the witnesses were required to adopt. In fact, there was no other evidence for them to follow, for there was no testimony before them based on the correct standard as it has now been defined by the Court in this case.

It is respectfully submitted that the record presents a case in which respondents are entitled to a reversal under the rule which has been announced by this Court, viz:

"And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

Fillippon v. Albion Slate Co., 250 U. S. 76, 63 L. Ed. 853.

To the same effect, in a condemnation suit, is the case of *McCandless v. United States*, 298 U. S. 342, 80 L. Ed. 1205.

In giving the quoted passages from the Charge to the jury, the trial judge also violated California practice, as well as the general rule, in giving instructions without evidence in the record to support them.

Buttrick v. Pacific Elec. Ry. Co., 86 C. A. 136, 260 Pac. 588.

See, also, *McCrate v. Morgan Packing Co.*, 117 F. (2d) 702.

-II.

The Conclusion That the Government Is Entitled to Recover From the Respondents Miller, Humphrey, and McConnell the Amounts Paid to Them in Excess of the Verdict Is Predicated Upon an Interpretation of the Declaration of Taking Act That Omits Consideration of the Fifth Amendment as It Has Been Uniformly Interpreted by This Court.

As the Court will recall, this feature of the case was not discussed by either counsel at the time of the oral argument, the allotted time having been consumed in dealing with the other issue. Taking this circumstance into account, together with the points made in the argument which follows, we very earnestly urge that the question presented is one which merits the further consideration of this Court upon rehearing.

In upholding the judgment of the District Court against the respondents, Miller, Humphrey and McConnell, for the amount that each had received in excess of the verdict it does not appear that the Court, in dealing with the interpretation of the Declaration of Taking Act, has considered the bearing of the Fifth Amendment on said Act.

It has been the respondents' contention, and we again respectfully urge, that irrespective of the question of lack of due process that was present in this case, the Declaration of Taking Act, in order to afford a landowner the security guaranteed by the Fifth Amendment, must be construed as meaning that when his land is taken, absolutely, under the procedure established by said Act, the landowner is vested with an absolute right to receive, in any event, as compensation for the taking of his land, the amount that is deposited.

Considering the denial of interest on the sum that is deposited, the validity of the Act under the Fifth Amendment

cannot be sustained under any other interpretation; if the Act be construed, as otherwise it must, as giving the government the right to say to the landowner,

"Take the amount we have deposited, or else; if you contest our estimate you are going to lose interest on the amount we deposit as well as lose the use of your land and if you draw down the deposit you may have to pay it back," then it clearly denies the just compensation, as of the date of taking, that is guaranteed in the Fifth Amendment and may become the source of oppression such as the Bill of Rights was intended to prevent.

Nothing so *unjust* can logically be deemed to be the equivalent of *just* compensation.

On the other hand, if it is held, as the Congress must have intended, that the right of the landowner to receive the sum deposited, without interest, is absolute, just as the title to the property and its immediate use are taken absolutely by the Government by the Declaration of Taking, the result stated in the above hypothesis is avoided.

According to the many decisions of the Court dealing with the subject, the full compensation that is assured to the owner of property taken for public use includes compensation (interest) for delay in payment, and a denial of interest has consistently been regarded as a violation of the Fifth Amendment.

Phelps v. United States, 274 U. S. 341;

Jacobs v. United States, 290 U. S. 13;

United States v. Klamath, etc., 304 U. S. 119;

Brooks-Scanlon Corp. v. United States, 265 U. S. 106.

Upon giving full consideration to the provision of the Act pertaining to the payment of interest and the denial of interest on the amount that is deposited in the court, read with the provision that allows the payment, forthwith, of

the amount deposited, upon application of a party, it appears to have been intended that the amount deposited was to be regarded as an unconditional and absolute payment, *pro tanto*, of the just compensation, as of the date of taking, guaranteed to the landowner by the constitution.

It was recognized that without making provision for the deposit of the money in the Court when the land was taken the Act would violate the Constitution; and if the Act is now to be construed as requiring the landowner to draw the money at his peril (lest he lose the interest) then, as a practical matter, he is no better off than if there were no provision in the Act for a deposit.

In the decision of the Circuit Court of Appeals in the case of *Garrow v. United States* decided November 25, 1942; which is cited in your Honors' opinion, it does not appear that any consideration was given to the fact that no interest was allowed on the amount deposited, and that decision should not be accepted and followed as authority upon a matter of such paramount importance.

Since the Brief for Respondents on this appeal was filed, a decision of the District Court in Nebraska has been published, in which that court discusses quite extensively the provisions of the Act, and announces a conclusion that supports the claim of these respondents that they are entitled to retain the amount that was deposited in the court.

United States v. 17,280 Acres, 47 F. Supp. 267.
We desire, also, to cite again, for a logical and learned discussion of this act, the case of *United States v. Certain Lands, etc., New York*, 39 F. Supp. 91.

We respectfully submit that a rehearing of this cause should be granted.

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"Certificate of Counsel.

We hereby certify that the foregoing Petition for Re-hearing is presented in good faith and not for delay.

FRANCIS CARR and
LAURENCE J. KENNEDY,
Attorneys for Respondents,

By _____"

(4273)

SUPREME COURT OF THE UNITED STATES.

No. 78.—OCTOBER TERM, 1942.

The United States of America,
Petitioner,
vs.
Victor N. Miller, et al.

On Writ of Certiorari to
the Circuit Court of
Appeals for the Ninth
Circuit.

[January 4, 1943.]

Mr. Justice ROBERTS delivered the opinion of the Court.

This case presents important questions respecting standards for valuing property taken for public use. For this reason, and because of an apparent conflict with one of our decisions, we granted certiorari.

The United States condemned a strip across the respondents' lands for tracks of the Central Pacific Railroad, relocation of which was necessary on account of the prospective flooding of the old right-of-way by waters to be impounded by the Central Valley Reclamation Project in California. For many years a proposal to initiate state reclamation works in this vicinity had been before the people of the State. In 1932 they voted approval and authorization of the project. It was, however, subsequently adopted by the United States as a federal project.

April 6, 1934, the Chief of Engineers of the Army recommended that the Government contribute twelve million dollars towards the project.¹ Congress authorized the appropriation in the following year.² December 22, 1935, the President approved construction of the entire improvement. In 1936 Congress appropriated \$6,900,000 for it and in 1937 \$12,500,000.³ In August 1937 the project was again authorized by Congress.⁴

In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior stated that Shasta, California, had been selected for the site of the Sacramento River dam. Its construction involved relocation of some thirty miles of the line of the railroad.

¹ Rivers and Harbors Committee Document No. 35, 73d Cong., 2d Sess., p. 5.

² Act Aug. 30, 1935, 49 Stat. 1028, 1038.

³ Act June 22, 1936, 49 Stat. 1620, 1622; Act Aug. 9, 1937, 50 Stat. 564, 597. An additional appropriation of \$9,000,000 was made by Act of May 9, 1938, 52 Stat. 291, 324.

⁴ Act Aug. 26, 1937, § 2, 50 Stat. 844, 850.

1597

Portions of respondents' lands were required for the relocated right-of-way. Alternate routes were surveyed by March 1936 and staked at intervals of 100 feet. Prior to the authorization of the project, the area of which respondents' tracts form a part was largely uncleared brush land. In the years 1936 and 1937 certain parcels were purchased with the intention of subdividing them and, in 1937, subdivisions were plotted and there grew up a settlement known as Boomtown, in which the respondents' lands lie. Two of the respondents were realtors interested in developing the neighborhood. By December 1938 the town had been built up for business and residential purposes.

December 14, 1938, the United States filed in the District Court for Northern California a complaint in eminent domain against the respondents and others whose lands were needed for the relocation of the railroad. On that day the Government also filed a declaration of taking.⁵ In this declaration the estimate of just compensation to be paid for a tract belonging to three of the respondents as co-tenants was estimated at \$2,550 and that sum was deposited in court. On the application of these owners the court directed the Clerk to pay each of them one-third of the deposit, or \$850, on account of the compensation they were entitled to receive.

The action in eminent domain was tried to a jury. The respondents offered opinion evidence as to the fair market value of the tracts involved and also as to severance damage to lots of which portions were taken. Each witness was asked to state his opinion as to market value of the land taken as at December 14, 1938, the date of the filing of the complaint. Government counsel objected to the form of the question on the ground that, as the United States was definitely committed to the project August 26, 1937, the respondents were not entitled to have included in an estimate of value, as of the date the lands were taken, any increment of value due to the Government's authorization of, and commitment to, the project. The trial court sustained the objection and required the question to be reframed so as to call for market value at the date of the taking, excluding therefrom any increment of value accruing after August 26, 1937, due to the authorization of the project. Under stress of the ruling, and over objection and exception, questions calling for opinion evidence were phrased to

⁵ Pursuant to Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. §§ 258a-258e.

comply with the court's decision. The jury rendered verdicts in favor of various respondents.

The three respondents who had received \$850 each on account of compensation were awarded less than the total paid them. The court entered judgment that title to the lands was in the United States and judgment in favor of respondents respectively for the amounts awarded them. Judgment was entered against the three respondents and in favor of the United States for the amounts they had received in excess of the verdicts with interest. They moved to set aside the money judgments against them on the ground that the court had no jurisdiction to enter them. The motions were overruled. All of the respondents appealed, assigning error to the trial judge's ruling with respect to the questions to be asked the witnesses, to his charge which had instructed the jury that, in arriving at market value as of the date of taking, they should disregard increment of value *due to the initiation of the project*⁶ and arising after August 26, 1937, and three of them to his entry of money judgments for the United States.

The Circuit Court of Appeals reversed the judgment holding, by a divided court, that the trial judge erred in his rulings and in his charge, and unanimously that the District Court was without jurisdiction to award the United States a judgment for amounts overpaid.⁷ A majority of the court were of opinion the witnesses should have been asked to state the fair market value of the lands as of the date of taking without qualification, and the judge should have charged that this value measured the compensation to which the respondents were entitled.

1. The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken.⁸ The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.⁹

⁶ The majority of the court below were in error in characterizing the ruling of the trial judge. They said: "To put it simply, the Court ruled that no evidence could come in as to sales of similar properties after August 26, 1937, and that qualified witnesses testifying as to the value of the land on the date of the taking must subtract from this valuation *any increment in value after August 26, 1937.*" 125 F. 2d 78.

⁷ 125 F. 2d 75.

⁸ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326.

⁹ *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304; *United States v. New River Collieries Co.*, 262 U. S. 341, 343.

It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the "value",¹⁰ the "market value",¹¹ and the "fair market value"¹² of what is taken. The term "fair" hardly adds anything to the phrase "market value", which denotes what "it fairly may be believed that a purchaser in fair market conditions would have given",¹³ or, more concisely, "market value fairly determined".¹⁴

Respondents correctly say that value is to be ascertained as of the date of taking.¹⁵ But they insist that no element which goes to make up value as at that moment is to be discarded or eliminated. We think the proposition is too broadly stated. Where, for any reason, property has no market resort must be had to other data to ascertain its value;¹⁶ and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.

Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its

¹⁰ Bauman v. Ross, 167 U. S. 548, 574.

¹¹ Boom Co. v. Patterson, 98 U. S. 403, 408; United States v. New River Collieries Co., *supra*, 344.

¹² Orgel, "Valuation under Eminent Domain" (p. 56): "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." United States v. Chandler-Dunbar Co., 229 U. S. 53, 81.

¹³ New York v. Sage, 239 U. S. 57, 61.

¹⁴ Olson v. United States, 292 U. S. 246, 255.

¹⁵ 2 Lewis, Eminent Domain, 3d Ed., § 795; Kerr v. South Park Commissioners, 117 U. S. 379, 386; Shoemaker v. United States, 147 U. S. 282, 304.

¹⁶ See Monongahela Navigation Co. v. United States, *supra*, 312, 328-9, 337-8; Hanson Co. v. United States, 261 U. S. 581, 589.

peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value.

Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.¹⁷ Thus although the market value of the property is to be fixed with due consideration of all its available uses,¹⁸ its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.¹⁹ The district judge so charged the jury and no question is made as to the correctness of the instruction.

There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property taken by the action of the public authority in previously condemning adjacent lands? If so, were the lands in question so situate as to entitle respondents to the benefit of this increment?

Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it.

This has begotten subsidiary rules. If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract.²⁰ Such damage is often, though somewhat loosely, spoken of as severance damage. On the other hand, if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken.²¹

As respects other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential dam-

¹⁷ *Bauman v. Ross*, 167 U. S. 548, 574; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195; *Olson v. United States*, *supra*, 256.

¹⁸ *Boom Co. v. Patterson*, 98 U. S. 403, 408; *United States v. Chandler-Dunbar W. P. Co.*, 229 U. S. 53, 81.

¹⁹ *United States v. Chandler-Dunbar W. P. Co.*, *supra*, p. 76.

²⁰ *Lewis, Eminent Domain*, 3d Ed. 686; *Nichols, Eminent Domain*, 2d Ed. § 236; *Bauman v. Ross*, *supra*, 574; *Sharp v. United States*, 191 U. S. 341, 351-2, 354; *cf. United States v. Welch*, 217 U. S. 333; *United States v. Grizzard*, 219 U. S. 180; *Campbell v. United States*, 266 U. S. 368.

²¹ *Bauman v. Ross*, *loc. cit.* Congress has provided that in takings such as that here involved benefits to the remainder of the tract shall be considered

ages,²² and unless the legislature so provides, as it may,²³ benefits are not assessed against such neighboring tracts for increase in their value.

If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

In which category do the lands in question fall? The project, from the date of its final and definite authorization in August, 1937, included the relocation of the railroad right-of-way, and one probable route was marked out over the respondents' lands. This being so, it was proper to tell the jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property. If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible pur-

by way of reducing the compensation for what is taken. Act July 18, 1918, c. 155, § 6, 40 Stat. 911, 33 U. S. C. § 595.

²² Sharp v. United States, *supra*; Campbell v. United States, *supra*, 371-372.

²³ Shoemaker v. United States, *supra*, 302.

chasers from them, as to what the Government would be compelled to pay as compensation.

Shoemaker v. United States, 147 U. S. 282, is directly in point and supports this view notwithstanding respondents' efforts to distinguish the case. There Congress, in 1890, authorized commissioners to establish a park along Rock Creek in the District of Columbia and, for that purpose, to select not exceeding two thousand acres of land. In 1891 the commissioners prepared a map of the lands to be acquired, which was approved by the President as required by the statute. Proceedings were brought to condemn certain tracts lying within the mapped area. The Supreme Court of the District instructed the appraisers, whom the Act made the triers of fact, that they "shall receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act . . . authorizing said park . . ." The instruction was approved by this court.

The majority of the court below thought the case distinguishable in the view that the boundaries of the park were fixed by the Act of Congress authorizing the project and, therefore, it was known what land would lie inside, and what outside, the park from the beginning, and that land taken for the park should not have the benefit of an increase in value which adjoining land might enjoy through its proximity to the improvement. This, of course, would be true if the lines of the park had, in the beginning, been fixed, because property lying outside the boundaries of the park, and not intended to be taken, would be dissimilar from that lying within it, the one gaining value by proximity and the other gaining nothing from the fact that it was to be taken from its owner. Such was the ruling of the court in *Kerr v. South Park Commissioners*, 117 U. S. 379, 387. From the citation of that case in the *Shoemaker* opinion the majority below inferred that the two presented like facts. But, in the *Kerr* case, the lines of the park had been determined, whereas, in the *Shoemaker* case, the Act authorized the appropriation of a fixed acreage within a larger area. Consequently any land lying within that area was likely to be taken. If a tract happened not to be taken, because not within the limits finally fixed, it might show an increase in readily realizable market value by reason of proximity to the improvement. In the *Shoemaker* case the court excluded any increment of value arising out of the fact that Congress had authorized the location and condemnation

of land for the park, for the very reason that Shoemaker's property lay in the area within which the park was to be laid out. If, in the instant case, the respondents' lands were, at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.

The respondents assert that a different rule should have been applied in respect of severance damage even if the court's rulings were correct as to the valuation of land taken. In the light of what has already been said, we find no merit in the contention.

The respondents also say that, whatever the criterion of value adopted by the federal courts, Congress has adopted the local rule followed in the state where the federal court sits; and they claim that the California rule is settled that fair market value at the date of taking is the standard of value, without elimination of any increment attributable to the action of the taker. We need not determine what is the local law, for the federal statutes²⁴ upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States.²⁵

The respondents urge, further, that the reversal by the Circuit Court of Appeals is justified by the District Court's disregard of the practice of the California courts with respect to the production of opinion evidence as to market value, even though it was right as to the elements which must be excluded. They allege that, in California courts, an opinion witness must state his valuation as at the date of taking and the opposing party is at liberty, upon cross examination, to elicit the facts on which the witness relied in arriving at that value. Counsel insist that if the Government was

²⁴ Act of Aug. 1, 1888, c. 728, 25 Stat. 357, §§ 1 and 2, 40 U. S. C. §§ 257, 258; Act of Apr. 24, 1888, c. 194, 25 Stat. 94, 43 U. S. C. § 591.

²⁵ *Chappell v. United States*, 160 U. S. 499, 512-13; *Brown v. United States*, 263 U. S. 78, 86.

entitled to have the witnesses disregard any increment of value due to the Government's intention to construct the project it could have developed, on cross examination, how far the inclusion of any such element had affected the value stated. We think that probably under California procedure this would have been the better, and more appropriate way to develop the basis of the witnesses' opinions. We do not feel, however, that if there was a disregard of the local practice in this aspect the error is substantial or worked injury to the respondents.

2. We think the court below erred in holding the District Court without power to enter a judgment against three of the respondents to whom payments in excess of the jury's verdicts had been made out of the funds deposited with the Court.

Examination of the Act of February 26, 1931,²⁶ discloses that the declaration of taking is to be filed in the proceeding for condemnation at its inception or at any later time. When the declaration is filed the amount of estimated compensation is to be deposited with the court to be paid as the court may order "for or on account" of the just compensation to be awarded the owners. Thus the acquisition by the Government of title and immediate right to possession, and the deposit of the estimated compensation, occur as steps in the main proceeding.

The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. The Act recognizes that there may be an error in the estimate and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest. But there is no correlative provision for repayment of any excess by the owner to the United States. The necessary result is, so the respondents say, that any sum paid them in excess of the jury's award is their property, which the United States may not recover.

All the provisions of the Act taken together require a contrary conclusion.²⁷ The payment is of estimated compensation; it is

²⁶ *Supra*, Note 5.

²⁷ See *Garrow v. United States* (C. C. A. 5), decided November 25, 1942, — F. 2d —.

intended as a provisional and not a final settlement with the owner; it is a payment "on account of" compensation and not a final settlement of the amount due. To hold otherwise would defeat the policy of the statute and work injustice; would be to encourage federal officials to underestimate the value of the property with the result that the Government would be saddled with interest on a larger sum from date of taking to final award, and would be to deny the owner the immediate use of cash approximating the value of his land.

Respondents assert that whatever the substantive right of the United States to repayment of the surplus, the District Court in rendering judgment against them deprived them of property without due process of law. We think the contention is unsound.

The District Court was dealing with money deposited in its chancery to be disbursed under its direction in connection with an action pending before it. The situation is like that in which litigants deposit money as security or to await the outcome of litigation. Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund but retained jurisdiction to deal with its retention or repayment as justice might require.

Denial of notice and hearing is asserted. But, while it is true that the court included the judgment of restitution in its general judgment in the condemnation proceedings without notice to the parties or hearing, the respondents made motions to set aside the judgment against them, and the court heard and acted on the motions. The respondents had full opportunity to urge any meritorious reasons why judgment of restitution should not be entered against them.²⁸ We think they were entitled to no more.

State courts have proceeded as did the court below, under analogous statutes,²⁹ and our decisions justify the District Court's action.³⁰

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

²⁸ In the judgment originally entered the court added interest from the date of payment of the moneys to the respondents. After hearing on the motions, the court modified the judgment to impose interest only from the date of the judgment in the eminent domain proceeding.

²⁹ *Lewis, Eminent Domain*, 3d Ed., § 843; *Carish v. County Highway Committee*, 216 Wis. 375.

³⁰ Compare *Baltimore and Ohio R. R. Co. v. United States*, 379 U. S. 781; *Northwest Fuel Co. v. Brock*, 139 U. S. 216.

